(6) No. 93-1525

Supreme Court, U.S.
FILED
JUL 25 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Amtrak's policy barring the display of political advertising in Pennsylvania Station, New York, was not federal action, where:

   a) the United States created Amtrak, endowed it with governmental powers, owns all its voting stock, and appoints all the members of its Board;

   b) the United States-appointed Board is responsible for and approved the advertising policy challenged here;

   c) the United States keeps Amtrak afloat every year by subsidizing its losses; and

   d) Pennsylvania Station was purchased for Amtrak by the United States and is shared with several other governmental entities.

2. Whether the court of appeals erred in holding that a higher degree of state involvement with a private entity must be shown to establish state action for First Amendment claims than for sex and race discrimination claims.

PARTIES TO THE PROCEEDINGS

Petitioner Michael A. Lebron was plaintiff-counter-defendant-appellee below. Respondent the National Railroad Passenger Corporation (Amtrak) was defendant-appellant below. Transportation Displays, Incorporated, a defendant in the proceedings before the district court, appears on the caption of the proceedings below as defendant-counter-claimant but did not participate in the proceedings before the court of appeals.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 12 F.3d 388.[1] The opinion of the district court (Pet. App. 1b-22b) is reported at 811 F. Supp. 993.

[1] "Pet. App.," "J.A.," "C.A. App.," and "C.A. Exh." refer respectively to the following documents: the appendix to the Petition for a Writ of Certiorari; the Joint Appendix in this Court; the Joint Appendix in the court of appeals, and the exhibit volumes in the court of appeals. The plaintiff's and the defendants' exhibits were all offered and admitted in evidence by the district court on January 27, 1993. Tr. 8-10, 12, 13-15, 17-20.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1993. The petition for a writ of certiorari was filed on March 28, 1994, and granted on May 23, 1994. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent portions of the Rail Passenger Service Act, 45 U.S.C. § 501 *et seq.* (1988 and Supp. II 1990, Supp. IV 1992), and one provision of the Regional Rail Reorganization Act, 45 U.S.C. § 701 (1988), are set forth in an appendix to this brief.

STATEMENT

In 1992, petitioner Michael A. Lebron contracted with respondent National Railroad Passenger Corporation ("Amtrak"), the owner of Pennsylvania Station ("Penn Station"), to display an advertisement during January and February 1993 in a large advertising space at Penn Station known as the Spectacular. Pet. App. 2a, 2b. The work, a photomontage with text, executed in the style of an advertisement, makes the point that the profits generated by the Coors Brewing Company support various conservative causes. *Id.* at 4a-5a.[2] During negotiations for the advertising space, Lebron disclosed that his work was political, and was not told this would pose a problem. *Id.* at 3a-4a. Three days before the beginning of the contract period, however, Amtrak informed Lebron that it would not display his work because it violated Amtrak's policy against displaying "political" advertisements. *Id.* at 5a; 4b; J.A. 285. Amtrak has displayed other political advertisements in Penn Station, and at the time was displaying a four-sided, seven-foot advertising kiosk directly in front of the Spectacular for *The Plain Truth*, a conservative religious-political magazine expressing views on such issues as homosexuality, gambling, the Arab-Israeli conflict, and the European Union. Pet. App. at 19b-20b; J.A. 176-77 at ¶ 98; C.A. App. 204-35, 997-1002, 1144-75.

[2] Ten copies of the petitioner's photomontage—in reduced size—are being lodged with the Clerk of the Court.

Petitioner sued Amtrak and its agent, Transportation Displays, Incorporated ("TDI"), contending that Amtrak's policy and action violated the First Amendment. Pet. App. 1b-2b. The district court, per then-District Judge Pierre N. Leval, concluded that Amtrak was a government actor and that Amtrak's advertising policy violated the First and Fifth Amendments. *Id.* at 21b. A divided court of appeals reversed, ruling that Amtrak is not a government actor. *Id.* at 12a. Chief Judge Jon O. Newman dissented. *Id.* at 13a.

A. AMTRAK

The facts found by the district court, which were explicitly accepted by the court of appeals (Pet. App. 9a, 13a), establish that the United States created Amtrak, owns all of its voting stock, wholly controls membership of its Board of Directors, endows it with governmental powers, bankrolls it, and purchased and holds the mortgage on nearly all its property, including Penn Station.

1. *Congress's Creation of Amtrak*—The decades following World War II saw a rapid decline in the viability of the intercity passenger railroad train as the automobile and the airplane came to dominate the market for intercity travel. Donald M. Itzkoff, *Off the Track: The Decline of the Intercity Passenger Train in the United States* 5 (1985) ("Itzkoff"). "By the middle of this century . . . 'this time-honored vehicle' threatened to 'take its place in the transportation museum along with the stagecoach, sidewheeler, and the steam locomotive.' "[3]

[3] *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 453-54 (1985) (quoting Hosmer, Examiner, Report and Recommended Order, Railroad Passenger Train Deficit, ICC Docket No. 31054 at 69 (1958)).

When the Penn Central Transportation Company, the tenth largest corporation in the country and a major provider of passenger rail services, went bankrupt in 1970, Congress responded to the crisis in rail passenger service by enacting the Rail Passenger Service Act of 1970 ("RPSA"), which created Amtrak. Pub. L. No. 91-518, 84 Stat. 1327 (1970); Itzkoff at 79, 96; Mark B. Tobey, *Costs, Benefits, and the Future of Amtrak*, 16 Transp. L. J. 245, 253 (1987).

Congress initially envisioned that Amtrak would operate at a profit with substantial private investment.[4] Thus, it established Amtrak as a "for-profit" corporation under the District of Columbia Business Corporations Act, so long as those provisions did not conflict with the RPSA.[5] At the outset, Congress specified that Amtrak's Board would have 15 members: the Secretary of Transportation; seven members appointed by the President; three elected by the common shareholders; and four elected by the preferred shareholders, if any.[6] Thus, from the beginning, the federal government appointed the majority of Amtrak's Board. Congress classified Amtrak as a "mixed-ownership government corporation" (31 U.S.C. § 9101(2)(A)) subject to the Government Corporation Control Act, 31 U.S.C. § 9101 *et seq.*, which mandates federal fiscal oversight. RPSA, Pub. L. No. 91-518, § 804, 84 Stat. 1327, 1340 (1970).

Congress financed the establishment of Amtrak with a $40 million direct federal grant and $300 million in federal loan guarantees. J.A. 179 at ¶ 111; 45 U.S.C. § 501 *et seq.* It directed the Secretary of Transportation to designate a basic system of intercity passenger service that Amtrak would provide. 45 U.S.C. § 522. Under the Act, existing railroads could

[4] RPSA, Pub. L. No. 91-518, § 101, 84 Stat. 1327, 1328 (1970) (current version at 45 U.S.C. § 501); H.R. Rep. No. 1580, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4735.

[5] RPSA, Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (1970) (current version at 45 U.S.C. § 541).

[6] RPSA, Pub. L. No. 91-518, § 303, 84 Stat. 1327, 1330-31 (1970) (current version at 45 U.S.C. § 543).

be relieved of their responsibility to provide service by contracting with Amtrak to assume their services. 45 U.S.C. §§ 561(1) and (2). All but a few railroads elected to do so. J.A. 590, Stip. D. As a result, Amtrak assumed nearly all intercity passenger service obligations.[7]

In 1973, when seven bankrupt railroads in the northeast and midwest could not agree on a reorganization plan, Congress took further action, enacting the Regional Rail Reorganization Act, 45 U.S.C. § 701 *et seq.* ("RRRA"). 45 U.S.C. § 701(a)(1) and (2). In so doing, Congress specifically found that the

> public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions and consumers.

45 U.S.C. § 701(a)(3). The RRRA directed "the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region." 45 U.S.C. § 701(b)(2), (3), and (4).

To this end, Congress instructed the Secretary of Transportation and the United States Railway Association, which consisted almost entirely of federal officials, to create and adopt a Final System Plan. 45 U.S.C. §§ 716-17. The Final System Plan, a comprehensive document of more than 400 pages, approved by Congress in 1975, set forth an elaborate scheme under which the Consolidated Rail Corporation ("Conrail") and Amtrak would become, respectively, the dominant freight and intercity passenger carriers. The Plan specified how the Northeast Corridor would be acquired and financed (recognizing that passenger fares would not cover costs); outlined a Northeast Corridor improvement program;

[7] Amtrak eventually absorbed all privately operated intercity passenger train service, and since 1983 Amtrak has been the sole provider of such service. *See* Don Phillips, *Railroads' Attempt to Track New Future for Dying Trains*, Travel Weekly 236 (May 31, 1983).

and detailed how the Northeast Corridor should be operated. J.A. 443-67; C.A. App. 519-957.

In 1976, Congress conveyed the Northeast Corridor properties first to Conrail and then to Amtrak pursuant to the Final System Plan and the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. No. 94-210, 90 Stat. 31 (1976)). J.A. 185-86 at ¶¶ 139-40; C.A. Exh. 958-66. The United States eventually "paid Penn Central $2.113 billion as compensation for the Northeast Corridor properties, including Penn Station," the largest settlement payment in United States history. Pet. App. 9b n.7; J.A. 188-89 at ¶¶ 154-57 (and authority cited there).

2. *Congress's Restructuring of Amtrak*—From the beginning, Amtrak operated at a loss, and required massive annual federal subsidies. H.R. Rep. No. 1182, 95th Cong., 2d Sess. 7-9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2313, 2314-17. By 1978, Congress recognized that its 1970 hope that Amtrak would become a profit-making entity with considerable private investment would not be realized. Amtrak's operations had not attracted the number of rail passengers needed to make the railroad a profitable operation, and few of the bankrupt railroads had elected to invest in Amtrak by taking its shares as part of the settlement of their bankruptcies. H.R. Rep. No. 1182, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2313, 2314.[8] In a candid attempt to "conform the law to reality," Congress replaced the original language of 45 U.S.C. § 541—"Amtrak shall be a for-profit corporation"—with the more accurate "Amtrak shall be operated and managed as a for-profit corporation." H.R. Rep. No. 1182, 95th Cong., 2d Sess. 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2313, 2323 ("This amendment recognizes that Amtrak is not a for-profit corporation").

In 1981, Congress went even further and revamped Amtrak's corporate structure to ensure total federal control of

[8] Indeed, the number of issued common shares of Amtrak has never increased. J.A. 387, 418.

Amtrak and to eliminate any private, non-governmental input into Amtrak's governance. Congress reduced the size of Amtrak's Board from fifteen to nine and omitted all directors elected by the common shareholders, the private railroad companies.[9] From that point on, Amtrak's Board consisted solely of federal appointees.

In addition, in order to protect the government's substantial and continuing financial support of Amtrak, Congress required Amtrak's Board to issue to the United States preferred shares in amounts that equaled all funds Congress had by then appropriated for Amtrak and to issue preferred shares equal to Congress's appropriations in the future.[10] For the same reasons, Congress directed that no stock or debt instrument with a liquidation interest superior to the preferred stock (all owned by the United States) or secured by Amtrak's property (all pledged to the United States) could be issued without the consent of the Secretary of Transportation.[11]

3. *Amtrak's Formal Corporate Structure*—Today, Amtrak's corporate structure and governance ensure that the United States retains control of the corporation. 45 U.S.C. § 501 *et seq.*

The United States appoints, directly or indirectly, all of Amtrak's directors. 45 U.S.C. § 543(a); Pet. App. 7b. The President directly appoints five of the Board's nine members, three with the advice and consent of the Senate. 45 U.S.C.

[9] 45 U.S.C. § 543; Amtrak Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 687, 689-691 (1981).

[10] 45 U.S.C. § 544(c); S. Rep. No. 139, 97th Cong., 1st Sess. 318 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 606. When the number of preferred shares Amtrak was required to issue to the United States was about to exceed the number of preferred shares then authorized by Amtrak's articles of incorporation, Congress amended Amtrak's statute to provide that the issuance of such shares would not require an amendment of Amtrak's articles of incorporation. 45 U.S.C. § 544(c)(4); J.A. 293, 389-90.

[11] 45 U.S.C. § 544(d); S. Rep. No. 139, 97th Cong., 1st Sess. 318 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 606.

§ 543(a)(1)(C) and (D)(ii). The Secretary of Transportation sits *ex officio*. 45 U.S.C. § 543(a)(1)(A). Because the United States Government owns all of Amtrak's preferred stock, the Secretary of Transportation, who holds the stock, selects two members. 45 U.S.C. §§ 543(a)(1)(E), 544(c). The ninth Board member is Amtrak's president, who is selected by the other eight Board members. 45 U.S.C. § 543(a)(1)(B) and (d).

The United States owns all of Amtrak's preferred and *only voting* stock; the common shareholders (the four private railroad companies) have no right to vote for a member of the Board.[12] Moreover, the common stock has virtually no value. As of 1992, the United States owned 77,539,095 preferred shares, each with $100 par value, as compared to 9,385,694 common shares, each with $10 par value. J.A. 390-91 at note 3. Congress has directed that dividends of at least six percent per year, which are cumulative, must be paid on the preferred shares before any dividend is ever paid on the common shares. 45 U.S.C. § 544(a)(A), (B)(i), (B)(ii). The preferred shares also have a liquidation preference over the common shares. 45 U.S.C. § 544(a)(B)(ii). And in the event of a liquidation, Amtrak's obligations would far outweigh its assets. C.A. Exh. 1342; PX 61 at 18-28. Thus, the common shares are for all practical purposes worthless.

Congress has stated that Amtrak is "not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government" (45 U.S.C. § 541), but it treats Amtrak as a public entity in many respects. Amtrak is subject to the Freedom of Information Act[13] and the Government in the Sunshine Act,[14] laws to which no other private entities are subject. In the Americans with Disabilities Act, Congress designated Amtrak as a "public entity," along with state and local

12 45 U.S.C. §§ 543(a)(1) and (2); Pet. App. 7b; J.A. 181 at ¶¶ 117-18; 390-91 at Note 3; 592.

13 45 U.S.C. § 546(g); 49 C.F.R. Part 700 (1993).

14 5 U.S.C. §§ 552(e), 552b; H.R. Conf. Rep. No. 1441, 94th Cong., 2d Sess. 10-11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2244, 2246.

governments and agencies.[15] The Inspector General Act of 1978 identifies Amtrak as a "designated Federal entity," and requires it to maintain an Office of the Inspector General. 5 U.S.C. app. 2 § 8G (Supp. V 1993). No private entities are subject to the Inspector General Act. Finally, Congress made Amtrak's chief executive officer a member of the Tourism Policy Council, an "interagency coordinating council" composed of government entities and officials.[16]

"Amtrak has also been vested with various attributes of governmental character." Pet. App. 8b-9b. It has the power of eminent domain (45 U.S.C. § 545(d); Pet. App. 8b; J.A. 182 at ¶ 123), a traditional sovereign power vested in no private entities. It must submit three different reports annually on its operations and finances to Congress (45 U.S.C. § 548; Pet. App. 9b; J.A. 183-84 at ¶ 133); its financial transactions are monitored by an Inspector General and may be audited by the Comptroller General (31 U.S.C. §§ 9105-9106; 45 U.S.C. § 644(2); J.A. 183 at ¶ 132); and, for the first 22 years of its existence, it could borrow under the credit of the federal government (45 U.S.C. § 602, *repealed by* the Amtrak Authorization and Development Act, Pub. L. No. 102-533, § 7(c), 106 Stat. 3515, 3519 (1992); Pet. App. 8b-9b).[17]

15 42 U.S.C. § 12131(1); Pet. App. 7b & n.3.

16 22 U.S.C. § 2124a(a), (b)(1)(M), (d)(1). The other Council members are the Secretary of Commerce, the Under Secretary for Travel and Tourism, the Director of the OMB, a representative of the International Trade Administration chosen by the Secretary of Commerce, the Secretary of Energy, the Secretary of State, the Secretary of the Interior, the Secretary of Agriculture, the Chairman of the Tennessee Valley Authority, the Commanding General of the Army Corps of Engineers, the Administrator of the Small Business Administration, the Commissioner of the Immigration and Naturalization Service, the Commissioner of Customs, the Secretary of Labor, and the Secretary of Transportation. *Id.*

17 In 1976, Amtrak's fiscal year-end for accounting purposes was changed from December 31 to September 30 "to coincide with the fiscal year adopted by the federal government and used in providing federal assistance to [Amtrak]." Pet. App. 8b n.5; Amtrak Improvement Act of

Amtrak is authorized to employ its own police force. 45 U.S.C. § 545(j). The Amtrak police at Penn Station, appointed as police officers by the State of New York, have the right to make arrests on Amtrak property when "provid[ing] security and protection for rail passengers. . . and for rail properties." *Id.*; N.Y.R.R. Law § 88 (McKinney 1991); J.A. 58-60.

Like federal agencies and unlike private corporations, Amtrak is exempt from the burden of paying taxes or other fees (including all real estate taxes) imposed by any state or local authority. As a result, Amtrak is relieved of the burden of paying the annual New York real estate tax on Penn Station of nearly $18 million. 45 U.S.C. §§ 546(n), 546b; J.A. 353-67.

4. *Congress's Financial Interrelationship with Amtrak*—The federal government is "deeply involved in the financing of Amtrak's operations" and the acquisition and maintenance of its assets. Pet. App. 7b-8b. As noted earlier (*see supra* p. 6), the United States provided over $2 billion for the purchase of Amtrak's Northeast Corridor properties, including Penn Station. The federal government holds a mortgage valued at "hundreds of millions of dollars" on those properties, which secures a note that does not mature for nearly 1000 years (the year 2975).[18]

In addition, in every one of its 24 years of existence, Amtrak has depended on substantial federal subsidies to cover its losses.[19] Between 1988 and 1992 alone, Congress appropriated $3.312 billion to subsidize Amtrak's operating losses. 45 U.S.C. § 601; Pet. App. 7b-8b; J.A. 190 at ¶ 166. And Congress has invested billions of dollars in maintenance,

1975, Pub. L. No. 94-25, 89 Stat. 90, 90 (1975); H.R. Rep. No. 119, 94th Cong., 1st Sess. 7 (1975), *reprinted in* 1970 U.S.C.C.A.N. 165, 169; J.A. 190 at ¶ 162; 409.

[18] Pet. App. 9b; J.A. 57, 194 at ¶ 187, 390 at Note 2, 414. Neither that note nor another, secured by Amtrak's rolling stock, bears interest unless prepaid, which according to its 1992 Annual Report, "Amtrak does not intend to do." J.A. 390 at Note 2.

[19] Pet. App. 7b-8b; J.A. 46-47, 50, 189 at ¶ 161, 191-92 at ¶ 175; C.A. Exh. 1320.

rehabilitation, and development of the Northeast Corridor.[20] The United States retains control over Amtrak's properties because they cannot be sold or leased without approval of the federally-appointed Board (J.A. 25, 468-70), and cannot be disposed of or downgraded without approval of the Secretary of Transportation (45 U.S.C. § 566(a)).

Because of Amtrak's dependence on federal subsidies, a dollar of revenue earned by Amtrak is a dollar saved by the United States. Pet. App. 8b. In recognition of this direct fiscal relation, Congress has specifically encouraged Amtrak to enter into profit-generating contracts with the private sector in order to reduce the level of federal subsidies. 45 U.S.C. § 501a(1), (14); Pet. App. 8b n.5. One of Amtrak's revenue-generating enterprises consists of leasing advertising space in its stations and along its right of way. Thus, as the district court found, "Amtrak's revenues from the leasing of its billboard space are, in a sense, revenue of the federal government." Pet. App. 8b.

5. *Amtrak's Interrelations With Other Public Authorities*—Amtrak's governmental relationships are not limited to the United States. Penn Station, one of the busiest hubs in New York City, also serves as a station for New Jersey Transit ("NJT") and the Long Island Railroad ("LIRR"), both public authorities.[21] The New York subway system, operated by the New York City Transit Authority ("NYCTA"), another public authority, abuts the station at both ends.[22]

As the district court found,

> An array of leases and joint agreements among Amtrak, LIRR, and NJT govern the management of the public

[20] *See* 45 U.S.C. § 854; Pet. App. 9b; J.A. 191 at ¶¶ 170-71; C.A. Exh. 1342.

[21] N.J. Stat. Ann. § 27:25-4 (West 1994); N.Y. Pub. Auth. Law § 1263 (McKinney 1982 & Supp. 1993); N.Y. Transp. Law § 219-c (McKinney 1982 & Supp. 1993); Pet. App. 9b n.8.

[22] N.Y. Pub. Auth. Law §§ 1201, 1263 (McKinney 1982 & Supp. 1993); J.A. 19-20, 154-55 at ¶¶ 7-8.

> areas of Penn Station, the passage of passengers through the station and from one transportation facility to another, and the funding of construction and maintenance of various train and tunnel facilities.

Pet. App. 9b n.8.[23] Some LIRR and NJT facilities, such as ticket and information booths, are located in the midst of Amtrak's facilities on the same floor as the Spectacular. *Id.* An NYCTA official shares space in Amtrak's information booth on that floor (J.A. 88, 195 at ¶ 196), and easements with NYCTA permit subway passengers to use Penn Station as a transfer point (*id.* at 19-21). Although constitutional restrictions indisputably apply to the LIRR, NJT, and NYCTA, the public has no way of knowing whether any particular area of Penn Station is governed by Amtrak or one of the other governmental transportation authorities. Pet. App. 9b n.8.

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6. *Amtrak's Board and Advertising in Penn Station*—The federal government's involvement with Amtrak extends to the particular advertising policy challenged in this case, by virtue of its control of Amtrak's Board and the Board's responsibility for that policy. J.A. 166-68 at ¶¶ 59-63. Amtrak's federally-appointed Board has direct authority over Amtrak's advertising policies. J.A. 24-25, 166 at ¶ 59. The Board has delegated authority to implement that policy, subject to Board review, to Anthony DeAngelo, the Vice President for Real Estate and Operations Development. Pet. App. 4b; J.A. 24-25, 30-31, 166 at ¶ 59; C.A. App. 739-40.

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[23] For example, Amtrak, the Metropolitan Transit Authority (which owns and operates the LIRR), and the LIRR have entered into an agreement under which Amtrak and the LIRR will jointly design, construct, operate, and maintain a modern system for the central control of train movements in and around Penn Station and the East River tunnels. J.A. 197 at ¶ 201; C.A. Exh. 1589, 1678-1768, 1922-2019, 2074-76, 2078-79. Amtrak has also entered into a "Northeast Corridor Services Agreement" with New Jersey Transit to improve service and equipment in the Northeast Corridor. J.A. 197 at ¶ 203; C.A. Exh. 1104-1143. Through these and other agreements, Amtrak's operations at Penn Station are inextricably intertwined with the operations of these governmental entities.

Amtrak's Board has consistently and closely supervised the arrangements by which advertising space, including the Spectacular, is leased in Penn Station. Amtrak's Board is required to authorize all new contracts regarding the leasing of advertising. J.A. 42. The record shows that the Board authorized an agency contract to lease advertising space in 1991, and also authorized an individual contract for the Spectacular in 1987.[24] J.A. 200, 368-73, 401-02.

The advertising policy at issue here preceded DeAngelo's arrival at Amtrak in 1982 (J.A. 17, 29-30, 34) and is reflected in writing in Amtrak's leasing contracts (*id.* at 25, 28-29, 200, 204 at § 6, 221, 227 at § 6, 244, 261 at ¶ 27, 318, 325-26 at ¶¶ 17-18). DeAngelo testified that the policy applied to all advertising on Amtrak property, and required that advertising material be "noncompetitive with our business interest, . . . not pornographic, and not objectionable to our riding public and others associated with us including political and other types of potentially controversial matters." J.A. 27-28. He defined "objectionable to the riding public" as

> [i]ssues that would cause our passengers to be concerned and upset to write letters to us, to talk about it amongst themselves and things which they would find inappropriate for Amtrak to be part of

(J.A. 37). The ban on political advertising does not extend to all noncommercial advertising, and several noncommercial advertisements have been displayed at Penn Station in addition to the longstanding *Plain Truth* advertisement described above. Pet. App. 19b-20b; J.A. 176-77 at ¶¶ 94-98; *see supra* pp. 2-3.

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[24] The approvals involved several layers of review. For example, in 1987, in connection with the first of several A&S Department Store, Inc. contracts for the Spectacular, the Chair of the Board's Real Estate Subcommittee, also a Board member, first "reviewed the terms and conditions of the lease" and then "following discussion," the Subcommittee recommended a resolution that "the Corporation is authorized to enter into a lease with A&S. . . ." J.A. 368-69. The same day, the Finance Subcommittee also recommended the resolution (*id.* at 370-71), and the next day, after a Board member advised the Board of the financial terms of the lease, the Board approved the resolution (*id.* at 372-73).

The leasing contracts to which DeAngelo pointed as reflecting Amtrak's advertising policy date from 1967, 1980, 1985, and 1991. J.A. 40-43, 200, 221, 244, 318. In the 1980 contract, Amtrak reserved the right to disapprove advertising that in its sole judgment

> may be unlawful, immoral, improper or offensive to good taste, or be in competition directly or indirectly with the transportation conducted by [Amtrak]; or involve political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public or involve matters or ramifications not anticipated or foreseeable.

J.A. 261-62 at ¶ 27. In the 1985 and 1991 contracts, Amtrak reserved the right to disapprove "advertising material (including advertising content) which may be considered objectionable by Amtrak." J.A. 227 at § 6; 204 at § 6.

B. PROCEEDINGS BELOW

1. After an expedited trial based on written submissions largely stipulated by Amtrak (Pet. App. 2b; J.A. 153-199 at ¶¶ 1-209), District Judge Leval made extensive findings regarding Amtrak's dependence upon and control by the United States. Carefully considering all these facts, he concluded that the "federal government's deep and controlling entwinement in Amtrak's structure and operations" justified treating Amtrak's policy regarding speech access to Penn Station billboards as government action. Pet. App. 6b.

In reaching this result, Judge Leval rejected respondent's reliance on a number of cases that had held that Amtrak (or Conrail) is not a federal actor for routine employee decisions. Pet. App. 10b-11b. Noting that "[w]hether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue" (*id.* at 11b), the district court held that permitting Amtrak to deal with routine employee matters under the same rules that govern private employers

did not implicate the same profound constitutional consequences as would permitting Amtrak to allocate access to government-purchased properties to speakers on political grounds (*id.* at 11b-12b). Endowed with the status of a private actor, Amtrak "would be free to exercise discriminatory control over the messages transmitted by its billboards" (*id.* at 12b) and could " 'effectively drive certain ideas or viewpoints from the marketplace' " (*id.* at 13b (quoting *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991))).

The district court concluded that it was "inconceivable" that Amtrak should have such freedom to control ideas when "[its] directors are appointed by the President, [its] operations are financed by the Government, and [it] is subject to Governmental control and intertwinement in all the respects outlined above." Pet. App. 13b. Amtrak, it held, "must be deemed to engage in governmental action when it undertakes to regulate the content of the advertisements on its billboards." *Id.* at 14b.

The district court then held that Amtrak's policy for regulating advertising on its billboards violates the First Amendment because (1) it is not clearly set forth; (2) its vagueness permits abuse; (3) it is not consistently applied; and (4) it may discriminate on the basis of viewpoint. Pet. App. 14b-21b. Accordingly, the district court directed Amtrak to give petitioner "immediate access to the Spectacular in accordance with his contract" (*id.* at 22b). That order was later stayed by a panel of the court of appeals.

2. A divided court of appeals reversed, holding that "Amtrak is not a governmental actor subject to the strictures of the First Amendment." Pet. App. 3a. The panel majority did not "take issue" with the district court's detailed findings regarding the interrelationship between Amtrak and the federal government, but "rather with the legal conclusion that is derived from it." Pet. App. 9a.

The panel relied on three factors in concluding that Amtrak is not a government actor for purposes of regulating speech access to Penn Station. First, it concluded that Amtrak is a private entity because Congress stated that it is "not an agency" of the United States. Pet. App. 7a. Second, it noted that several prior courts had found Amtrak or Conrail not to be federal actors for purposes of routine employee decisions. Pet. App. 9a, 11a-12a. It rejected Judge Leval's view that these cases were distinguishable because they did not address conduct with broad public consequences for speech by noting that one employee case, *Myron v. Consolidated Rail Corporation*, 752 F.2d 50 (2d Cir. 1985), included a First Amendment claim. Pet. App. 9a-10a. The panel majority made no attempt to compare the facts of government involvement in the earlier cases with the facts here, nor to assess whether Amtrak's objective characteristics made it a government entity.

Third, the panel majority held that Lebron had to meet a heightened showing of state involvement to demonstrate state action, because "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation." Pet. App. 10a-11a.

While the district court found that *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and its progeny compelled a finding that Amtrak and the federal government had a "symbiotic relationship" (Pet. App. 5b-6b), the panel majority made no attempt to distinguish *Burton*, and instead simply stated in a footnote that "[s]ome commentators have suggested" that its authority has been "curtailed" (*id.* at 8a n.1).

Because it found no government action, the panel majority did not address the district court's conclusion that Amtrak's policy violated the First Amendment, and that issue is not presented here.

Chief Judge Newman dissented. Pet. App. 13a. Agreeing with Judge Leval, he concluded that the "extensive involvement of the Government in the structure and financing of Amtrak" qualifies Amtrak as a "governmental actor, subject to First Amendment limitations, when it undertakes to regulate the political content of advertisements on billboards." *Id.* at 14a.

On the merits of petitioner's First Amendment claim, Judge Newman concluded that "Amtrak's advertising policy may well run afoul of First Amendment limitations," but that while damages or declaratory relief would be appropriate, an injunction requiring display of the advertisement would not. Pet. App. 15a-16a.

SUMMARY OF ARGUMENT

Had the Long Island Railroad barred Michael Lebron's advertisement from its area of Penn Station on the basis of a policy against "objectionable" political advertising, the First Amendment would indisputably apply.[25] Amtrak is in every relevant respect as much a governmental entity as the Long Island Railroad, and therefore its policies and conduct must similarly be subject to constitutional restraint.

1. In most state action cases, the Court must determine whether the conduct of a private entity should be treated as state action because of government involvement with that entity. Here, by contrast, the entity that acted—Amtrak—is itself a governmental entity. Where, as here, the government appoints an entity's board or is otherwise "entwined in the management or control" of the enterprise, the entity is a government actor for constitutional purposes. *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957); *Evans v. Newton*, 382 U.S. 296 (1966).

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[25] *International Soc. for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (publicly owned airport governed by First Amendment); *Penthouse Int'l v. Koch*, 599 F. Supp. 1338 (S.D.N.Y. 1984) (New York subways governed by First Amendment); *Kissinger v. New York City Transit Auth.*, 274 F. Supp. 438 (S.D.N.Y. 1967) (same).

Although Congress initially created Amtrak with the hope that it might someday become a profitable and independent private enterprise, the reality is that Amtrak is now for all practical purposes a government agency. Acknowledging this reality, Congress amended Amtrak's structure in 1981 to ensure that the United States maintains full control of the corporation, both by virtue of owning all of its voting stock and by wholly appointing its Board. Just as it does with the Department of Transportation, the United States appoints Amtrak's head policy-makers, determines its structure and goals, and allocates the necessary tax dollars to keep it running. Just as the Department of Transportation's policies are subject to constitutional review, so too should Amtrak's be.

2. Even if the Court does not treat Amtrak as a governmental entity for all purposes, it is a governmental actor for purposes of the specific conduct challenged here because Amtrak enjoys a "symbiotic relationship" with the federal government and several state and local governments at Penn Station. A "symbiotic relationship" exists where government, by virtue of fiscal interdependence, authority to control, and sharing of space, can be characterized as a "joint participant" with a private entity. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). That test is easily satisfied here.

The United States could not be more fiscally interdependent with Amtrak. Because Congress covers Amtrak's losses every year, a dollar earned by Amtrak is a dollar saved by the United States. That fiscal interest extends to the specific conduct challenged, because both Amtrak's policy barring "objectionable" political advertising and its application to Lebron were driven by concerns about offending potential passengers and thereby losing revenue.

The United States has unlimited authority to control Amtrak. Congress created Amtrak by statute, and has revised Amtrak's policies, duties, and structure whenever it has deemed fit. Amtrak's Board is itself a governmental body, and

is directly responsible for the policy Lebron challenges, which it has approved.

Finally, Amtrak's physical interrelations with government at Penn Station are inextricably intertwined. Penn Station itself was purchased by the federal government, transferred to Amtrak, and is secured by an interest-free note that does not mature for 1000 years. And Amtrak shares Penn Station with three different governmental entities—New Jersey Transit, the New York City Transit Authority, and the Long Island Railroad. To the millions of public commuters who pass through Penn Station every year, it is virtually impossible to tell where Amtrak ends and one of many government entities begins.

3. Even absent its "symbiotic relationship," Amtrak's conduct in this case would constitute federal action because Lebron challenges an official corporate policy for which the federally appointed Board is directly responsible. The Board's policy "compelled" and "encouraged" the rejection of Lebron's advertisement, and is subject to constitutional review. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 546 (1987).

To hold that Amtrak is *not* a government actor would mean that an entity not only dependent upon but wholly controlled by the government would have a constitutional right to allocate billions of dollars of government-purchased properties to support speech on one side of any controversial political issue. Not only would Lebron and others have no constitutional claim where Amtrak suppressed their speech, but Amtrak would have a constitutional claim if Congress attempted to restrain its politically biased practices.

4. Finally, the court of appeals held, contrary to the explicit or implicit holdings of eleven other Circuits, that a higher state action threshold applies for First Amendment claims than Equal Protection claims. The state action inquiry is designed to determine when an entity should be subjected to constitutional constraints, and that determination does not turn on a necessarily subjective ranking of constitutional pro-

visions. Moreover, even if such a ranking were appropriate, there is no basis for treating First Amendment claims less favorably than Equal Protection claims.

ARGUMENT

I. AMTRAK IS A GOVERNMENTAL ENTITY FOR CONSTITUTIONAL PURPOSES BECAUSE THE UNITED STATES OWNS AND CONTROLS IT

The Constitution constrains governmental action "by whatever instruments or in whatever modes that action may be taken." *Ex parte Virginia*, 100 U.S. 339, 346-47 (1879). Government operates in many forms: through the legislative, executive, and judicial branches; through officials, employees, and agents; and increasingly through government corporations such as Amtrak. Because the United States owns and controls Amtrak, Amtrak should be subject to the same constitutional limits as a government agency.

A. Entities Controlled by Government Are Subject to Constitutional Constraints

"In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988). In this case, by contrast, the issue is whether the entity charged with the decisive conduct—Amtrak—is itself a governmental entity for constitutional purposes. Petitioner contends that it is, because it is owned and controlled by the United States.

While Congress initially created Amtrak with the hope that it would become an independent, profitable enterprise, that hope was soon dashed, as Amtrak required massive government subsidies every year to keep afloat. In 1978, Congress acknowledged by statute that Amtrak was *not* a "for-profit

corporation." And in 1981, Congress abandoned the notion of private participation in Amtrak by eliminating from the Board any directors elected by the common shareholders and ordering issuance to the United States of preferred shares equal to the government's investment. "The net result of this statutory change was to make Amtrak a wholly owned Federal Government corporation in fact if not in name." Cong. Res. Serv. Rep. No. 83-236 GOV, *Administering Public Functions at the Margin of Government: The Case of Federal Corporations* 193 (1983).[26]

Today, the United States owns all of Amtrak's voting stock. It appoints eight members of Amtrak's Board, and the ninth is chosen by the other eight. And the Board of federal appointees in turn manages "the property, affairs and business of the Corporation." J.A. 635 at § 4.01; D.C. Code Ann. § 29-332 (1981).

In addition to being controlled and owned by the government, Amtrak acts like a government agency. It exercises powers "traditionally associated with sovereignty, such as eminent domain." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974). It is subject to numerous federal laws to which private entities are not. And like other federal entities, it is exempt from many state and local laws. It operates on property—including Penn Station—that the United States purchased for it.[27] And for every year of Amtrak's 24-year existence, the United States has appropriated hundreds of millions of dollars, without which Amtrak would have ceased to exist. By all objective criteria, Amtrak is a governmental

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[26] The only "private" feature of Amtrak that remains are the four private railroads' common shares in Amtrak. These shares, however, are nothing more than vestigial remnants of Congress's early hope that Amtrak might be privatized. As noted above, they are practically worthless, and, because they are nonvoting, they entail no ability to control the corporation. *See* Statement of Facts, *supra* at p. 8.

[27] The fact that the United States was willing to transfer property worth hundreds of millions of dollars to Amtrak, backed by an interest-free note that does not mature for 1000 years, only underscores Amtrak's governmental character; it is exceedingly unlikely that the United States would be so generous to a private entity over which it had no control.

entity: it owes its creation and continued existence to the United States, and the United States owns and controls it.

Had the Eagle Coffee Shoppe in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, been owned by the State, run by a Board appointed by the Governor, and kept afloat through annual state subsidies, there would have been no dispute that its racially discriminatory access policy was state action. Had the private school in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), been owned by the government, run by a government-appointed School Board, and operated on government-purchased property, the school's discharge of schoolteachers for their speech would surely have been subject to a First Amendment challenge. And had the electrical utility in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), or the nursing home in *Blum v. Yaretsky*, 457 U.S. 991 (1982), been owned by the state and run by state-appointed boards, can there be any doubt that the Court would have found state action? What made each of these cases difficult was the fact that the entities directly acting were indisputably private. That is just not so here.

The most analogous state action case that this Court has decided is *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957). In that case, the Court unanimously held that Girard College, which was built, maintained, and operated with private funds, was nonetheless a state actor for constitutional purposes because it was run by a state-appointed Board, the "Board of Directors of City Trusts of the City of Philadelphia." *Id.* at 231. In *Evans v. Newton*, 382 U.S. 296 (1966), the Court extended that principle to a privately owned park that had been administered by the city, but had subsequently been transferred to the management of private trustees. The Court held that as long as "the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment." *Id.* at 301.[28]

[28] While the dissenters in *Evans* disagreed about whether *as a factual matter* the municipality retained management or control responsibilities, 382 U.S. at 312-22 (dissenting opinions of Black, J., and Harlan, J.), no one disputed the legal principle that if the municipality did have that responsibility, the park would be subject to the Constitution.

The case for treating Amtrak as a government actor is much stronger than either of these cases. Like Girard College, Amtrak is run by a governmentally-appointed Board; in addition, Amtrak was built, maintained and operated with *public* funds, and is owned by the government and endowed with governmental powers. The United States is, in short, fully "entwined in the management or control" of Amtrak.

As early as 1946, this Court unanimously held that a corporation should be treated as a governmental entity where it manifests governmental characteristics. *Cherry Cotton Mills v. United States*, 327 U.S. 536 (1946). In language equally applicable to Amtrak, the Court stated:

> [the Reconstruction Finance Corporation's] Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear. *That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes.*

327 U.S. at 539 (emphasis added). Similarly, here, the fact that Congress chose to call Amtrak a corporation "does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes."

Other corporations over which the government exercises control through appointment of the board and partial or complete ownership have been treated as government actors for constitutional purposes. For example, the Federal Deposit Insurance Corporation ("FDIC") and the Resolution Trust Corporation ("RTC"), both "mixed-ownership government cor-

porations" like Amtrak, 31 U.S.C. § 9101(2)(C),(L), have been subjected to constitutional claims.[29] Similarly, the Tennessee Valley Authority, which like Amtrak is run by a federally appointed board but was created to operate as a business enterprise and generates substantial revenues from the private marketplace, has been treated as a government actor.[30]

Governments increasingly employ the corporate form at both the federal and state level to perform a wide variety of

[29] *FDIC v. Meyer*, 114 S. Ct. 996 (1994) (holding that due process challenge to FDIC's termination of bank officer does not support *Bivens* action, but not questioning applicability of Constitution); *FDIC v. Mallen*, 486 U.S. 230, 248 (1988) (applying due process analysis to FDIC's use of a statutory postsuspension procedure for discharging indicted bank official); *Nimon v. Resolution Trust Corp.*, 975 F.2d 240, 247-48 (5th Cir. 1992) (due process challenge to RTC's procedures for resolving insurance coverage dispute); *Gross v. Bell Savings Bank*, 974 F.2d 403, 405 (3d Cir. 1992) (due process challenge to RTC's withholding of savings and loan association's pension funds); *California Housing Sec., Inc. v. United States*, 959 F.2d 955, 957 (Fed. Cir.), *cert. denied*, 113 S. Ct. 324 (1992) (takings claim against RTC).

The FDIC and RTC boards are appointed by the President, 12 U.S.C. §§ 1812, 1441a(a)(3), and both receive federal funding, 12 U.S.C. §§ 1821(a)(6)(D)(J), 1824, 1441a(i)(1)(A). Unlike Amtrak, however, they are largely self-sufficient. Francis J. Leazes, *Accountability and the Business State: The Structure of Federal Corporations* 33 (1987) (FDIC is "self-supporting, financed mainly from insurance assessments paid by insured banks"); Dirk S. Adams, Rodney R. Peck, and Jill W. Spenser, *FIRREA and the New Federal Home Loan Bank System*, 32 Santa Clara L. Rev. 17, 26-29 (1992) (most of RTC's funding comes from private sources).

[30] 16 U.S.C. § 831a, 831n-4; *Hoke Co. v. Tennessee Valley Auth.*, 854 F.2d 820 (6th Cir. 1988) (adjudicating First and Fifth Amendment challenge to TVA's decision to contract with unionized contractor); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) (First Amendment challenge to TVA's building of dam); *see also Old Republic Ins. Co. v. Federal Crop Ins. Corp.*, 947 F.2d 269 (7th Cir. 1991) (due process challenge to procedures used by Federal Crop Insurance Corporation, a wholly owned government corporation, to recover insurance overpayments); *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 201-02 (2d Cir. 1987) (due process challenge to termination of pension plans by Pension Benefit Guaranty Corporation, a wholly owned government corporation).

public services.[31] In determining whether such entities are subject to the Constitution, the Court must ask whether the government is responsible for the entity's "management or control." *Evans*, 382 U.S. at 301. Where government-sponsored corporations are privately financed, privately owned, and run by boards selected by their private owners, they may not be government actors, absent the performance of a traditional public function or some other connection to government.[32] Similarly, where the federal government has merely chartered a private non-profit corporation, but does not own or control it, the corporation is not a government actor.[33] But at a minimum, where a corporation is owned and controlled by government, is dependent on federal appropriations for its very existence, exercises governmental powers, and controls billions of dollars of government-purchased property, it should be treated as a government actor for constitutional purposes.[34]

[31] Leazes, *Accountability*, *supra* n.29 (arguing that government corporations, if treated as private, will not be accountable to the public); Ronald C. Moe and Thomas H. Stanton, *Government-Sponsored Enterprises as Federal Instrumentalities: Reconciling Private Management with Public Accountability*, 49 Pub. Admin. Rev. 321, 321 (1989) ("the United States has entered an era of 'quasi government' where functions of a public character are increasingly assigned to entities of a public character whose legal status has been designed to be deliberately ambiguous"); Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 Pub. Admin. Rev. 461 (Nov./Dec. 1987) (same).

[32] For example, "government-sponsored enterprises"—such as the Farm Credit Banks, Federal Home Loan Banks, Federal National Mortgage Association, and the Student Loan Marketing Association—are privately owned, do not depend on regular federal appropriations, and are run by boards comprised of a majority of private sector members. Moe and Stanton, *Government-Sponsored Enterprises*, *supra* n.31 at 322; *Report of the Secretary of the Treasury on Government-Sponsored Enterprises* 4 (1990).

[33] *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 545-47 & nn.27-29 (1987); 36 U.S.C. § 1101 (listing federally chartered private corporations).

[34] Several lower courts have held that where the government appoints a majority of an entity's Board, the entity is effectively con-

B. The Court of Appeals Erroneously Relied on a Statutory Label to Resolve the Government Action Inquiry

Notwithstanding Amtrak's objective governmental character, the court of appeals concluded that it should be treated as a private entity because one of the hundreds of statutory provisions prescribing Amtrak's structure, obligations, and powers states that it is "not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government." 45 U.S.C. § 541; Pet. App. 7a.[35]

trolled by government and therefore should be treated as a government actor. *Foster v. Ripley*, 645 F.2d 1142, 1147 (D.C. Cir. 1981) ("The fact that the majority of the members of the [private corporation's] board of directors are [government] officials in itself is sufficient to find that the government exercises control over the actions of the [private corporation]"); *McVarish v. Mid-Nebraska Community Mental Health Ctr.*, 696 F.2d 69, 71 (8th Cir. 1982) (fact that 12 of Board's 17 members "were either appointed by or actual members of county boards of supervisors or commissioners" is sufficient to establish state action); *Chiaffitelli v. Dettmer Hosp., Inc.*, 437 F.2d 429, 430 (6th Cir. 1971) (fact that four of nine board members are appointed by the government and a fifth is a public official is sufficient to make hospital a state actor).

While the Sixth Circuit has subsequently held that government appointment of a minority of a board's members does not in itself establish state action, *Adams v. Vandemark*, 855 F.2d 312, 317 (6th Cir. 1988) (no state action where government appointed one-third of board), *cert. denied*, 488 U.S. 1042 (1989); *Crowder v. Conlan*, 740 F.2d 447, 451 (6th Cir. 1984) (no state action where government appointed only two of eleven board members), it has stated that government involvement on the board is "perhaps the strongest indication of a symbiotic relationship." *Adams*, 855 F.2d at 317.

[35] Several lower courts have also relied upon this language in deeming Amtrak not a governmental actor for constitutional purposes. *See, e.g., Anderson v. National R.R. Passenger Corp. (Amtrak)*, 754 F.2d 202, 204 (7th Cir. 1984); *Wilson v. Amtrak Nat'l R.R. Passenger Corp.*, 824 F. Supp. 55, 58 (D. Md. 1992); *see also Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 681 (7th Cir. 1987) (relying on similar language to hold Conrail not a government actor). Other courts have offered no analysis whatsoever, but have simply followed other decisions. *See, e.g., Railway Labor Executives' Ass'n v. National R. R. Passenger Corp.*,

Congress obviously did not intend to, because it could not, resolve the constitutional state action question with such a statutory label. At most, this language has statutory significance by providing that Amtrak is not covered by certain statutes otherwise applicable to government agencies, such as the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*[36]

Moreover, to the extent statutory labels matter, Congress has repeatedly identified Amtrak as a governmental or public entity, subjecting it to numerous statutes designed to make it accountable to the public. Amtrak is a "government corporation" subject to the Government Corporations Control Act, 31 U.S.C. § 9101(2);[37] a "designated Federal entity" subject to the Inspector General Act, 5 U.S.C. app. 2 § 8G (Supp. V 1993); a "public entity" under the Americans with Disabilities Act, 42 U.S.C. § 12131(1); and an "agency" for purposes of the Freedom of Information Act and the Government in the Sunshine Act, 45 U.S.C. § 546(g); 5 U.S.C. § 552b; 49 C.F.R. Part 700 (1993).[38] None of these statutes applies to private corporations.

The ambivalent labels Congress has attached to Amtrak only underscore the fact that such labels cannot resolve the

691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988); *Hankin v. National R. R. Passenger Corp.*, 86 Civ. 7233, 1987 U.S. Dist. LEXIS 10741, *7 (N.D. Ill. 1987); *cf. G & T Terminal Packaging Co. v Consolidated Rail Corp.*, 830 F.2d 1230, 1236 (3d Cir. 1987), *cert. denied*, 485 U.S. 988 (1988).

[36] *See Sentner v. Amtrak*, 540 F. Supp. 557, 561 (D.N.J. 1982) (interpreting 45 U.S.C. § 541 as a choice "not to make Amtrak a government entity, leaving it exposed to punitive liability, and thereby structuring a disincentive to dangerous misoperation"); *Ehm v. National R.R. Passenger Corp.*, 732 F.2d 1250, 1252 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984) (Amtrak not subject to APA).

[37] Government corporations, in turn, are generally deemed to be "executive agenc[ies]." 5 U.S.C. § 105.

[38] For example, Congress subjected Amtrak to the FOIA because "in view of the substantial Federal funds which are going to Amtrak, the taxpaying public is entitled to access to information about the conduct of Amtrak affairs." S. Rep. No. 756, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2393, 2397-98.

state action inquiry. It is not the formal label, but the objective indicia of governmental control and responsibility that determine whether an entity is a government actor for constitutional purposes. *Pennsylvania v. Board of Trustees*, 353 U.S. at 230; *Evans v. Newton*, 382 U.S. at 301. And Amtrak's objective characteristics are unambiguously governmental.[39]

C. If Amtrak Were Treated as a Private Entity, It Would Be Constitutionally Entitled to Allocate Speakers' Access to Government-Purchased Property on Politically Biased Criteria

As both Judges Leval and Newman pointed out below, treating Amtrak as a private entity would lead to "inconceivable" consequences. The consequences, moreover, would

[39] Perhaps misled by Congress's inconsistent labeling, this Court has twice—in dicta outside the state action context—described Amtrak as a "private, for-profit corporation." *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394, 1398 (1992); *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry Co.*, 470 U.S. 451, 454 (1985); *see also id.* 470 U.S. at 470 (characterizing Amtrak as a "nongovernmental corporation").

As explained above, while Amtrak was initially designated a "for-profit" corporation, that designation was abandoned in 1978. Moreover, it has always been designated a government corporation. In any event, the Court's prior characterizations of Amtrak were unnecessary to its decisions. In *Boston and Maine Corp.*, the Court merely upheld a property condemnation order of the Interstate Commerce Commission. In *Atchison, Topeka*, the Court sustained the constitutionality of a provision of the Rail Passenger Service Act (RPSA) requiring railroads to reimburse Amtrak for employee pass privileges. The Court stated in dicta that Amtrak's "Basic Agreements" were not between the railroads and the United States but "simply between the railroads and the nongovernmental corporation, Amtrak." 470 U.S. at 470. However, this characterization was not necessary to the Court's holding, because the Court found that "[a]bsolutely nothing in the RPSA or the Basic Agreements suggests that the railroads were relieved of the responsibility to reimburse Amtrak for the [pass privileges]." *Id.* at 478-79. Thus, even if the President himself had signed the Basic Agreements in his official capacity, it would not have altered the result.

extend far beyond Amtrak, leaving constitutionally unaccountable numerous entities that are governmental in every respect but name.

Under the court of appeals' holding, Amtrak is constitutionally free to allocate access to its billions of dollars of government-purchased property to whomever it chooses. It could sell advertising space only to the incumbent Administration during an election campaign. It could offer space only to those who advocate protection of reproductive choice or passage of President Clinton's health care bill, while denying access to those who are pro-life or oppose the President's bill. Not only would the First Amendment not be violated by such action, it would affirmatively *guarantee* Amtrak's right, as a private speaker, to make such choices. *Indeed, it would preclude Congress from statutorily barring such favoritism.*[40]

Nor would Amtrak's powers to discriminate stop there. If Amtrak is a private entity, it would be constitutionally free to charge discriminatory rates to women, Catholics, Republicans, or non-citizens. It could offer its property for some denominational religious services and not others. There are no

[40] The panel majority's only response to this concern was to note that federal election law would bar Amtrak, as a corporation, from *donating* its properties to a Presidential candidate during an election campaign. Pet. App. 11a. This response is insufficient for two reasons.

First, the election laws address only the narrow issue of *donations* to candidates; they have no applicability to a decision to *sell* advertising space only to the incumbent Administration, or to donate space for speech on public issues unconnected to a specific federal campaign.

Second, the fortuitous presence or absence of generic statutory prohibitions on private conduct does not determine whether an entity is a state actor. The fact that Congress has criminalized conspiracies to deprive individuals of their civil rights, for example, does not mean that private actors acting in concert with government officials are not also state actors for constitutional purposes. *West v. Atkins*, 487 U.S. 42 (1988). Whether Amtrak is a government actor does not turn on the vagaries of election law.

statutory bars to such conduct,[41] and if Amtrak is a private entity, the Constitution would not reach its conduct. Indeed, as a *constitutional* matter, Amtrak would be free to deny services on the basis of race.[42]

The point is not that Amtrak is about to embark on such conduct, but that if this Court treats Amtrak as private, it and many other entities like it on the federal, state and local level would be freed from conducting their activities in conformity with basic constitutional dictates. Congress could, for example, render the Resolution Trust Corporation free of its obligation to respect the property or due process rights of those against whom it acts. State and local entities could declare municipal hospitals, state universities, or public schools to be "private," and thereby effectively immunize their conduct from constitutional review, even as government authorities retained control and ownership.

Where a corporation is in fact private and independent of government control, as this Court found the United States Olympic Committee to be, it should generally not be bound by constitutional strictures. But where a corporation is controlled and owned by government, is fiscally dependent upon government for its continued survival, and controls billions of dollars of taxpayer-purchased property, it should not be treated as "something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes." *Cherry Cotton Mills v. U.S.*, 327 U.S. at 539.[43]

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41 Congress has expressly exempted Amtrak from all state, local or federal statutes and laws regarding rates and fares. 45 U.S.C. §§ 546(a)(1), (c).

42 While 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e, would statutorily prohibit most racial discrimination, the Constitution would have nothing to say about it if Amtrak were a private entity.

43 Indeed, when it is to its advantage to do so, Amtrak itself has argued that it ought to be treated as a governmental entity. In *Sentner v. Amtrak*, 540 F. Supp. 557, 558, 560 & n.7 (D.N.J. 1982), Amtrak argued that it could not be subject to punitive damages because it enjoyed the sovereign immunity of the United States. In *Riddle v. National R.R. Passenger Corp.*, 831 F. Supp. 442, 445 (E.D. Pa. 1993), Amtrak argued that it was entitled to qualified official immunity for actions taken by its Office of the Inspector General. Amtrak did not prevail in either argument, but it nonetheless demonstrates that Amtrak sees itself as a governmental entity at least for some purposes.

II. EVEN IF AMTRAK IS TREATED AS A PRIVATE ENTITY, ITS DECISION TO REJECT LEBRON'S ADVERTISEMENT STILL CONSTITUTES GOVERNMENT ACTION

Even if Amtrak is not treated as a governmental entity for all constitutional purposes, it should be treated as a governmental actor for purposes of Lebron's challenge to its content-based policy selectively barring his political advertisement from Penn Station. This determination requires a "necessarily fact-bound inquiry" into the full range of government contacts with Amtrak. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). Because Amtrak's policy barring "objectionable" political advertisements and its application to Lebron are "fairly attributable" to the government, it is a government actor. *Id.* at 937.

The Court has "articulated a number of different factors or tests in different contexts" for discerning whether a private entity's conduct can be treated as government action. *Id.* at 939. If any one of these tests is satisfied, government action should be found. Amtrak's conduct is government action under two distinct tests: (1) Amtrak has a "symbiotic relationship" with the United States and several state entities with respect to advertising at Penn Station; and (2) the United States specifically "encouraged" the challenged conduct through Board policy and statutory dictate. In addition, the fact that Amtrak provides an essential public service that cannot be sustained by the private market and is now exclusively performed by government further supports a finding of government action.

A. Amtrak Has a Symbiotic Relationship with the United States and Several State Entities at Penn Station

A private entity's acts must be treated as government action where the government has "so far insinuated itself into a position of interdependence with [the entity] that it must be recognized as a joint participant in the challenged action." *Burton v. Wilmington Parking Auth.*, 365 U.S. at 725. As then-District Judge Leval found, the United States is far more insinuated into Amtrak's business than Delaware was with the Eagle Coffee Shoppe in *Burton*, and therefore *Burton* compels a finding of federal action here.

1. Amtrak's Governmental Ties Are Far More Extensive Than Those in *Burton v. Wilmington Parking Authority*

In *Burton*, a private restaurant in a public parking garage refused to serve black customers. In a case that is widely viewed as an icon of the civil rights movement, the Court cited three factors to support what Chief Justice Rehnquist later termed a "symbiotic relationship"[44] between the private actor and government: (1) close financial interdependence between the private and governmental entities, *Burton*, 365 U.S. at 724; (2) governmental authority over the private entity, *id.* at 725; and (3) the sharing of physical space between the private and governmental entities, *id.* at 724-25.

The *Burton* Court found first that Delaware's financial interests were closely tied to the restaurant's discrimination because the restaurant rented the property from the state; its customers parked in the state's garage; and the restaurant's rationale for discriminating was revenue-driven: it feared losing business from potential white customers. *Id.* at 724. Second, the Court noted that Delaware *could* have regulated the private restaurant's conduct as a condition of its lease. *Id.* at 725. And third, because the restaurant was "an integral part of

[44] *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972).

a public building devoted to a public parking service," the Court found it would be a "grave injustice" to permit conduct in the private sections of the building that was constitutionally prohibited in the public sections. *Id.* at 724-25. On each of these three criteria, the facts here are stronger than in *Burton*.

First, because the United States bankrolls Amtrak's losses, every dollar of Amtrak's revenues is a direct fiscal concern of the United States.[45] The financial ties in *Burton* were indirect at best; here, they could not be more direct if Amtrak were literally part of the Department of Transportation. Indeed, the Secretary of Transportation is the conduit through which Amtrak receives funds from Congress; must approve the issuance of certain stock; was required to "issue general guidelines designed to assist the Corporation in the formation of capital and budgetary plans;" and, until late 1992, prescribed the terms and conditions of Amtrak's loan guarantees.[46]

As in *Burton*, the government's financial interdependence extends to the specific policy at issue here. Just as the restaurant in *Burton* justified its exclusion of black customers on revenue grounds, so here Amtrak justified its policy and its application against Lebron by arguing that it might lose revenue from offended passengers. J.A. 15-16, 79-82. Thus, as in *Burton*, the government is a financial beneficiary of the challenged discriminatory policy.[47]

[45] Amtrak's President has routinely argued to Congress that any costs or taxes imposed on Amtrak will ultimately be borne by the United States. *See, e.g.*, C.A. Exh. 1334 (seeking exemption from Federal Employers' Liability Act because "any financial savings achieved will directly reduce Amtrak's need for federal financial assistance"); C.A. Exh. 1487-88 (arguing that imposing customs duty on Amtrak would have a net impact on federal government revenues of zero as Amtrak would require additional federal operating funds in just that amount to pay the duty).

[46] 45 U.S.C. §§ 544(d), 548(c), 563(a), 564(b), 601(a), and 602 (*repealed by* the Amtrak Authorization and Development Act, Pub. L. No. 102-533, § 7(c), 106 Stat. 3515, 3519 (Oct. 27, 1992)).

[47] Indeed, the United States has expressly directed Amtrak to structure its contracts with private entities so as to reduce the United States' financial support of Amtrak. *See infra* Section II.B.

Second, where the *Burton* Court found state action supported by the mere fact that Delaware *could have* regulated the restaurant's customer policy as a term of its lease, here Amtrak's Board of federal appointees is directly responsible for the policy at issue. Amtrak's Board is charged with managing the "property, affairs and business" of the corporation, J.A. 635 at § 4.01; D.C. Code Ann. § 29-332 (1981), and is therefore "responsible for the determination and execution of corporate policy."[48]

Through Amtrak's federally-appointed Board, the government controls and manages the corporation. In this case, moreover, the United States' ability to control Amtrak extends beyond its appointment of the Board. It owns all of Amtrak's voting stock. Amtrak is dependent upon federal funding every year for its continued existence. The property at issue—Penn Station—was purchased by and is mortgaged to the United States. Congress can and does override corporate policy and structure whenever it chooses.[49] In short, the United States has unlimited authority to control Amtrak's policies.

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[48] Harry G. Henn and John R. Alexander, *Laws of Corporations* 564 (1983). Even where the Board delegates management authority, delegation "does not relieve directors of their legal responsibility" for corporate acts. Henn and Alexander, *supra*, at 575; American Bar Association-American Law Institute Model Bus. Corp. Act § 8.30 (1991); American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* § 4.01(b) (May 13, 1992); Fletcher Cyclopedia of the Law of Private Corporations § 392 (1990 and Supp. 1993).

[49] While Amtrak is generally subject to D.C. corporations law, Congress's statute governs wherever there is a conflict. 45 U.S.C. § 541. Moreover, when the number of preferred shares issued to the United States reached the maximum authorized by Amtrak's Articles of Incorporation, Congress simply overrode the limit by statute. 45 U.S.C. § 541(c)(4). Congress has even gone so far as to dictate which employees Amtrak must hire, 45 U.S.C. § 1113, and which persons it may not hire, 45 U.S.C. § 543(d) (barring non-citizens from employment as Amtrak officers).

In *Burton*, the State of Delaware played no role in developing or implementing the challenged policy; it was enough that the State could have prohibited it through its lease. Here, Amtrak conceded that its federally-appointed Board has authority to approve or disapprove Amtrak's advertising policies. J.A. 166 at ¶ 59. Moreover, the Board itself approved the challenged policy. Amtrak's Vice President for Real Estate Anthony DeAngelo testified that the policy is reflected in several contracts between Amtrak and its advertising leasing agent, each of which had to be approved by the Board.[50]

Third, even more so than the parking garage at issue in *Burton*, Penn Station is a large public space shared by governmental and non-governmental entities. The property itself was purchased with federal tax dollars and is mortgaged to the federal government. And Amtrak's intermingling of space, personnel and services with state and city transportation authorities at Penn Station is so closely interwoven that the district court found that there is little way of telling where those authorities' space and responsibilities end and Amtrak's begin. Pet. App. 9b n.8. As in *Burton*, 365 U.S. at 724-25, it

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[50] In its Brief in Opposition to the Petition for a Writ of Certiorari, Amtrak argued that its Board had no knowledge of or role in the challenged policy. Br. in Opp. at 5, 13, 17 & n.10. The record demonstrates that Amtrak's Board expressly authorized a 1991 leasing contract containing language barring advertising "objectionable to Amtrak," which DeAngelo pointed to as authority for Amtrak's advertising policy. J.A. 401-02.

The policy is also reflected in a 1980 leasing contract approved by the Board. While discovery did not include Board minutes back to 1980, DeAngelo testified that the 1980 contract would have required Board approval if it were a new contract as opposed to a renewal. J.A. 42, 401-02. The 1980 contract is plainly a new contract, as it does not recite that it is a renewal, does not refer to any previous contract, and specifically states that "[t]here are no understandings or agreements of any kind between the parties . . . other than as set forth in this permit . . . [and the agreement] constitutes the entire agreement between [the parties] on the subject matter hereof." J.A. 269 at ¶ 39. In addition, it is similar to the 1991 contract, which the Board expressly authorized, so under the presumption of regularity, the Board is presumed to have acted similarly with respect to the 1980 contract.

would be "a grave injustice" to allow Amtrak to engage in the suppression of political speech that its indisputably governmental partners plainly could not undertake.[51]

2. The Court of Appeals Improperly Disregarded *Burton v. Wilmington Parking Authority*

Unless *Burton* is no longer good law, state action is mandated by the facts presented here. While the court of appeals questioned *Burton*'s authority based on academic commentators' criticisms, this Court has consistently cited *Burton* with approval in its state action decisions, has never suggested that *Burton* has been overruled, and expressly relied on *Burton* to find state action as recently as 1991.[52]

The only case the court of appeals cited as possibly curtailing *Burton*'s authority, *San Francisco Arts & Athletics*, 483 U.S. 522, in fact carefully distinguished *Burton*, noting that plaintiffs "failed to demonstrate that the Federal Government *can or does* exert any influence over the exercise of the USOC's enforcement decisions." 483 U.S. at 547 n.29 (emphasis added). The Court noted that

> '[t]he USOC is an independent body, and *nothing in its chartering statute gives the federal government the right to control that body or its officers* . . . [Nor was] the federal government . . . able to exercise any type of '*de facto*' control over the USOC.'

Id. at 545 n.27 (quoting *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C.), *aff'd mem.*, 701 F.2d 221 (D.C. Cir. 1980)) (emphasis added). If the USOC had been owned by the United States, managed by a federally appointed Board, and dependent on federal funding for its existence, the government action result would undoubtedly have been different.

[51] *International Soc. for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701; *Penthouse Int'l v. Koch*, 599 F. Supp. 1338.

[52] *See, e.g., Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 621, 624 (1991); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 547 n.29 (1987).

This Court relied on *Burton* to find state action as recently as 1991, when it held that private attorneys for private civil litigants should be treated as state actors when they exercise peremptory challenges. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). As in *Edmonson* and *Burton*, the federal government through its close interrelationship with Amtrak has " 'elected to place its power, property, and prestige behind' " Amtrak, and therefore Amtrak must be treated as a government actor. *Id.* at 624 (quoting *Burton*, 365 U.S. at 725).

The state action analysis applied in *Burton* and followed by this Court ever since examines the overall relationship of the government to a putatively private entity. Unlike the "nexus" test discussed below, the "symbiotic relationship" test does not require a direct showing that the state compelled or encouraged the challenged action. The Wilmington Parking Authority neither encouraged nor compelled the Eagle Coffee Shoppe to discriminate, nor did the state in *Edmonson* encourage or compel the private litigant to strike jurors on discriminatory grounds. Yet because of the symbolic, legal, and financial interconnections between the private actor and the state in those instances, the Court found state action.

It is critical that the Court retain the *Burton* test, particularly in view of the increasing tendency among governments at all levels to act through corporations, enterprises, and other entities that are not formally governmental. These institutions can wield significant power, and often have responsibility for allocating billions of dollars of taxpayers' funds. Precisely because they are quasi-governmental, they may often take action without an express directive from a formal governmental body. Where, as here, the entity itself is closely dependent upon and controlled by government, the Court should treat its actions as state action even absent some further showing of an express governmental directive.

B. The United States Encouraged the Suppression of Lebron's Speech Through Amtrak's Board-Sanctioned Policy

Even if Amtrak is not sufficiently intertwined with government to satisfy the "symbiotic relationship" test, it is nonetheless a government actor for purposes of Lebron's challenge because the government " 'has exercised coercive power [and] has provided such significant encouragement, either overt or covert, that [Amtrak's] choice must in law be deemed to be that of the [government].' " *San Francisco Arts & Athletics*, 483 U.S. at 546 (quoting *Blum v. Yaretsky*, 457 U.S. at 1004). Where the "symbiotic relationship" inquiry considers the overall interrelationship between government and a private entity, the "nexus" test focuses on the government's connection to the specific *act* in question. Here, Amtrak's advertising policy was the very basis for the action at issue.

Encouragement short of a specific mandate is sufficient to satisfy the "nexus" test. In *Robinson v. Florida*, 378 U.S. 153, 154 (1964), for example, a private restaurant owner requested that black and white customers "sitting in" at a segregated restaurant leave. The Court treated this request as state action because a Florida health regulation and manual encouraged (but did not require) segregation by mandating separate toilet facilities for blacks and whites in integrated restaurants. Similarly, in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), the Court treated a private bus company's practice of broadcasting radio programs in its buses and streetcars as state action where the Public Utilities Commission had held a hearing into the practice and permitted it to continue. More recently, this Court unanimously stated in *West v. Atkins*, 487 U.S. 42, 52 (1988), that the requisite "encouragement" could be shown if the private party's challenged decisions "were made on the basis of some rule of decision for which the State is responsible."

Here, the United States is responsible for two "rules of decision" that not only encouraged, but formed the basis for

the rejection of, Lebron's advertisement. First and most important, Amtrak's Board of federal appointees is responsible for the very rule of decision that Lebron challenges: the policy against "objectionable" political advertising. That policy was expressly cited as the reason for rejecting Lebron's advertisement. Since a federally appointed body is responsible for that policy, actions pursuant to it are federal action.

Second, Amtrak's policy was in turn encouraged by Congress's statutory mandate that Amtrak seek in its contracts with the private sector to maximize revenue in order "to minimize Federal subsidies." 45 U.S.C. § 501a(1), (14). DeAngelo testified that Amtrak's policy against political advertising, and his rejection of Lebron's advertisement in particular, were predicated on concern that such expression might reduce revenues by offending passengers. J.A. 79-82. Thus, Congress's mandate to maximize revenue encouraged Amtrak to bar controversial political speech.

Accordingly, even under the more stringent "nexus" or "rule of decision" test, which focuses on the government's responsibility for the specific conduct challenged, the government has sufficiently encouraged the conduct challenged here to establish federal action.[53]

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[53] The fact that Amtrak's federally-appointed Board is directly responsible for the corporate policy Lebron challenges distinguishes this case from many of the lower court decisions that have declined to hold Amtrak or Conrail a government actor. Virtually all those cases involved routine employment disputes in which an employee challenged his or her individual termination, but did not challenge a Board policy, as Lebron does here. *Anderson v. National R.R. Passenger Corp. (Amtrak)*, 754 F.2d 202, 204 (7th Cir. 1984) ("no allegation that the government is involved with Amtrak's personnel policies or decisions."); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54 (2d Cir. 1985) (finding "nothing resembling federal supervision of day-to-day activities . . . so that its personnel decisions can be considered federal action"); *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725, 728 and n.3 (N.D. Ill. 1984) ("no [federal] regulation or policy [ ] could have caused [plaintiff's dismissal]"); *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 173 (M.D. Ala. 1982). Under the

C. Intercity Rail Passenger Service Has Become an Exclusive Government Function

A finding of government action under any of the above theories is further supported by the fact that intercity rail passenger service is, by Congress's own estimation, an essential public service that cannot be provided by the private market without massive government intervention. The governmental nature of an entity's function may, taken together with other indicia of state involvement, support a state action finding. *Edmonson*, 500 U.S. at 624-25.

Lebron does not contend that Amtrak's provision of intercity rail passenger service is a "traditional public function," nor that Amtrak's function is sufficient in itself to establish government action.[54] However, the fact that Congress considers intercity rail passenger service essential to the public and that it cannot be provided without massive government intervention should weigh in favor of a finding of government action when taken together with the extensive government ties detailed above.

"encouragement" doctrine, many routine employment terminations may be neither "encouraged" nor "compelled" by the Board's policy, and would therefore not be government action under that doctrine. *Cf. Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978) (municipality is liable for actions of its officers taken pursuant to policy, but not for employees' actions not authorized by policy). Under the "government entity" and "symbiotic relationship" tests advanced above, however, Amtrak's employment decisions would be subject to constitutional restraint, just as the employment actions of any government agency would.

[54] In some instances, a private entity's performance of a "traditional government function" is sufficient in itself to establish state action. *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town run by private corporation treated as state actor for purposes of regulating access to sidewalks for distribution of literature); *Terry v. Adams*, 345 U.S. 461 (1953) (all-white preprimary election within private club is state action).

Congress created Amtrak "to salvage an essential system of intercity rail passenger service,"[55] in order "to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions." 45 U.S.C. § 701(a)(3). In essence, Congress was forced to nationalize the passenger railroad in order to save it from extinction.[56]

Today, there are no private intercity rail passenger companies in existence in the United States. Amtrak Vice-President DeAngelo testified that running a passenger railroad is no longer a viable private business. J.A. 59; *see also* Mark B. Tobey, *Costs, Benefits, and the Future of Amtrak*, 16 Transp. L.J. 245, 299 (1987) ("The elimination of Amtrak will have the obvious and immediate consequence of preventing the public from choosing rail passenger service as a form of transportation."). Intercity passenger rail service has become an exclusive government function.

The fact that Amtrak provides an essential public service that cannot be provided absent substantial government intervention further supports a finding of federal action here.

[55] H.R. No. 1580, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4738; *id.* at 4735 (Amtrak created "to prevent the complete abandonment of intercity rail passenger service").

[56] Donald Itzkoff, *Off the Track: The Decline of the Intercity Passenger Train in the United States* 99 (1985) (quoting Secretary of Transportation John A. Volpe testimony that the "only option for keeping [rail passenger] service intact—the only one we could think of—is a takeover of the railroads"). The House Report made clear that the "assumption of passenger train service by the corporation is intended to include *all* intercity passenger service." H.R. Rep. No. 1580, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4735, 4737 (emphasis added).

III. THE AMOUNT OF STATE INVOLVEMENT NECESSARY TO ESTABLISH STATE ACTION SHOULD NOT BE GREATER FOR FIRST AMENDMENT THAN FOR EQUAL PROTECTION CLAIMS

In finding that Amtrak is not a federal actor, the court of appeals held that "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation." Pet. App. 10a. Under this rationale, had Amtrak denied Lebron access because of the political content of his message *and* because of his gender, it might be a state actor for purposes of the gender discrimination claim, but not for the First Amendment claim.

While Lebron maintains that Amtrak is a governmental actor no matter what state action standard is applied, the court of appeals' decision to hold him to a higher standard is contrary to this Court's decisions and to the purposes of the state action doctrine. The Court has repeatedly applied state action tests articulated in race discrimination settings to cases raising other constitutional claims, and vice versa. Thus, the Court has applied the *Burton* "symbiotic relationship" analysis to First Amendment and due process claims.[57] In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, the Court held that the state action rule for a due process challenge was "the same as that articulated in *Adickes v. S.H. Kress & Co.*, 398 U.S. [144,] 152 [1970], in the context of an equal protection deprivation." 457 U.S. at 941.[58]

[57] *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982) (applying *Burton* analysis to First Amendment claim); *Blum v. Yaretsky*, 457 U.S. 991, 1010-11 (1982) (applying *Burton* analysis to due process claim); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974) (applying *Burton* analysis to due process claim); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 119 (1973) (applying *Burton* analysis to First Amendment claim).

[58] The Second Circuit's holding stands alone among other courts of appeals. All of the other circuits that have addressed the issue have either explicitly or implicitly rejected a differential standard. Four circuits have expressly held that the state action standard does not differ depending on the constitutional right asserted. *Downs v. Sawtelle*, 574 F.2d 1, 6 n.5 (1st Cir.) (declining to adopt differential state action analysis, and stating that in any event court would apply same standard to discrimination and fundamental rights claims), *cert. denied*, 439 U.S. 910 (1978); *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324, 333 n.23 (9th Cir. 1973) (rejecting differential state action analysis), *cert. denied*, 419 U.S. 1006 (1974); *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 19 (5th Cir.) (en banc) (*Burton* state action test applies "in both racial and non-racial cases"), *cert. denied*, 429 U.S. 872 (1976); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975) (Stevens, J.) (state action analysis identical for due process and equal protection claims), *cert. denied*, 425 U.S. 943 (1976).

In addition, the Third, Fourth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits have implicitly rejected such a heightened requirement, applying the "symbiotic relationship" standard established in *Burton*, a race discrimination case, to other constitutional claims. *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir. 1992) (applying *Burton* analysis to due process and equal protection claim based on homosexual conduct); *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194 (10th Cir. 1988) (relying on *Burton* to find state action for First Amendment and due process claims by doctors challenging suspension by hospital); *Anderson v. USAir, Inc.*, 818 F.2d 49, 56 (D.C. Cir. 1987) (applying *Burton* analysis to Fifth Amendment claim against airline); *Jackson v. Pantazes*, 810 F.2d 426, 430 (4th Cir.1987) (finding state action under *Burton* analysis for a Fourth Amendment claim against private bail bondsman); *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987) (applying *Burton* analysis to First and Fifth Amendment claims against bank); *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984) (finding state action under *Burton* analysis for First Amendment, due process, and sex discrimination claims), *cert. denied*, 471 U.S. 1015 (1985); *Ruffalo v. Civiletti*, 702 F.2d 710 (8th Cir. 1983) (finding state action in due process challenge, stating that *Burton* standard "is equally applicable to cases involving federal government action under the Fifth Amendment").

The court of appeals' sliding scale makes no sense in light of the purpose of the state action doctrine: to determine when a putatively private entity should be treated as an official actor, not to create a hierarchy of constitutional rights. The state action doctrine accordingly looks to the nature of government involvement in a private entity's actions, the character of the function exercised by the private entity, and other factors that demonstrate government responsibility for an oth-

erwise "private" entity's acts. None of these inquiries should vary depending on the particular constitutional right asserted.[59]

Even if some sort of sliding scale were appropriate, there is no basis for saying that more state involvement need be shown for First Amendment than for sex and race discrimination claims. Under this Court's jurisprudence, a claim of sex discrimination triggers a *lower* standard of scrutiny than a claim of discrimination on the basis of political content.[60] A decision to exclude a speaker because of his political viewpoint triggers the same strict scrutiny as a decision to exclude a speaker because of his race.[61] Thus, to hold that a higher degree of state involvement is required for First Amendment

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[59] *See Parks v. "Mr. Ford"*, 556 F.2d 132, 153-54 (3d Cir. 1977) (Gibbons, J., concurring) (applying different state action tests would impermissibly allow judges to impose subjective hierarchy of constitutional rights); *Isaacs v. Board of Trustees of Temple Univ.*, 385 F. Supp. 473, 485 n.11 (E.D. Pa. 1974) (Higginbotham, J.) (rejecting argument that courts "should be more reluctant to find 'state action' in cases which do not involve racial discrimination," because it is impossible to create a hierarchy of constitutional rights); Jody Young Jakosa, *Parsing Public From Private: The Failure of Differential State Action Analysis*, 19 Harv. C.R.-C.L. L. Rev. 193 (1984) (differential state action analysis based on hierarchy of rights is inconsistent with purposes of doctrine).

[60] *Compare Texas v. Johnson*, 491 U.S. 397 (1989) (requiring compelling state interest and narrowly tailored means to justify content-based restriction on speech) *with Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to sex discrimination claims).

[61] *Compare Texas v. Johnson*, 491 U.S. 397, *with Palmore v. Sidoti*, 466 U.S. 429 (1984) (strict scrutiny required for racial discrimination). Indeed, because speech is a "fundamental right," its selective deprivation triggers strict scrutiny under equal protection analysis as well. *Carey v. Brown*, 447 U.S. 455, 474 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *see also Downs v. Sawtelle*, 574 F.2d at 6 n.5 (even if some differential analysis were justifiable, same state action analysis should apply to discrimination claim regarding fundamental rights as to racial discrimination claim).

than for equal protection claims contravenes this Court's established constitutional doctrine.

The First Amendment is as fundamental to our democratic tradition and individual liberties as the Equal Protection Clause. When a nominally "private" entity controlled, owned, and funded by government discriminates against unpopular speakers, it is just as much a state actor as when it discriminates on the basis of gender or race.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed, and the case remanded for determination of Lebron's First Amendment claim.

Respectfully submitted,

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July 25, 1994

STATUTORY APPENDIX

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SUBCHAPTER I—GENERAL PROVISIONS

§ 501. Congressional findings

(a) The Congress finds that the public convenience and necessity require that the National Railroad Passenger Corporation provide, to the extent that the Corporation's budget allows, modern, cost-efficient, and energy-efficient intercity railroad passenger[1] service between crowded urban areas and in other parts of the country; that rail passenger service can help in alleviating the overcrowding of airways, airports, and highways; and that to the maximum extent feasible, travelers in America should have the freedom to choose the mode of transportation most convenient to their needs.

(b) The Congress further finds that a greater degree of cooperation is necessary among railroads, the Corporation, State, regional, and local governments and the private sector, labor organizations, and suppliers of services and equipment to the Corporation in order to achieve the level of performance sufficient to justify expenditure of public funds.

(c) The Congress further finds that—

(1) modern, efficient commuter rail passenger service is important to the viability and well-being of major urban areas and to the national goals of energy conservation and self-sufficiency;

(2) Amtrak, as a passenger service entity, should be available to operate commuter service through its subsidiary Amtrak Commuter under contract with commuter agencies which do not choose to operate such service themselves as a part of the governmental functions of the State;

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[1] So in original. Should be "passenger."

(3) the Northeast Corridor is a valuable national resource used by intercity passenger, commuter passenger, and freight services; and

(4) greater coordination between intercity and commuter passenger services are required.

§ 501a. Goals

The Congress hereby established the following goals for Amtrak:

(1) Exercise of the Corporation's best business judgment in taking actions to minimize Federal subsidies, including increasing fares, increasing revenues from the carriage of mail and express, reducing losses on food service, improving its contracts with operating railroads, reducing management costs, and increasing employee productivity.

(2) Encouragement of State, regional, and local governments and the private sector to share the costs of operating rail passenger service, including the costs of operating stations and other facilities, in order to minimize Federal subsidies.

(3) Improvement of the number of passenger miles generated systemwide per dollar of Federal funding by at least 30 percent within the two-year period beginning on October 1, 1981.

(4) Elimination of the deficit associated with food and beverage services by September 30, 1982.

(5) Implementation of strategies to achieve immediately maximum productivity and efficiency consistent with safe and efficient service.

(6) Operation of Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetable for such operation.

(7) Development of service on rail corridors, subsidized by States or private parties, or both.

(8) Implementation of schedules which provide a systemwide average speed of at least 60 miles per hour, and which can be adhered to with a degree of reliability and passenger comfort.

(9) Improvement of the feasibility of State-subsidized service through the use of technical assistance panels to coordinate, plan, and implement such service.

(10) Encouragement of rail carriers to assist in improving intercity rail passenger service.

(11) General improvement of Amtrak's performance through comprehensive, systematic operational programs and employee incentives.

(12) Implementation of policies ensuring equitable access to the Northeast Corridor by both intercity and commuter services.

(13) Coordination among the various uses of the Northeast Corridor, particularly intercity and commuter passenger services.

(14) Amtrak's maximization of the use of its resources, including the most cost-effective use of employees, facilities, and real estate. Amtrak is encouraged to enter into agreements with the private sector and undertake initiatives which are consistent with good business judgment and designed to maximize its revenues and minimize Federal subsidies.

§ 502. Definitions

For the purposes of this chapter—

(1) "Amtrak" means the National Railroad Passenger Corporation created under subchapter III of this chapter.

(2) "Amtrak Commuter" means the Amtrak Commuter Services Corporation created under subchapter V of this chapter.

(3) "Auto-ferry service" means intercity rail passenger service characterized by transportation of automobiles or recreational vehicles and their occupants, and, when space is available, of used unoccupied vehicles.

(4) "Avoidable loss" means the avoidable costs of providing passenger service, less revenues attributable thereto, as determined by the Interstate Commerce Commission under the provisions of section 553 of title 5.

(5) "Basic system" means (A) prior to October 1, 1979, the system of intercity rail passenger service designated by the Secretary under subchapter II of this chapter and section 563(a) of this title, and (B) on and after October 1, 1979, the system of intercity rail passenger service designated by the Secretary under section 4 of the Amtrak Improvement Act of 1978 (Public Law 95-421) and approved by the Congress, and service required to be operated under sections 564(d) and 564(e)[2] of this title and under section 4(g) of the Amtrak Improvement Act of 1978, including changes to such system or service made by the Corporation using the Route and Service Criteria.

(6) "Center" means the Performance Evaluation Center established under section 545 of this title.

(7) "Commission" means the Interstate Commerce Commission.

(8) "Commuter authority" means any State, local, or regional authority, corporation, or other entity established for purposes of providing commuter service, and includes the Metropolitan Transportation Authority, the

[2] See Reference in Text note below.

Connecticut Department of Transportation, the Maryland Department of Transportation, the Southeastern Pennsylvania Transportation Authority, the New Jersey Transit Corporation, the Massachusetts Bay Transportation Authority, the Port Authority Trans-Hudson Corporation, any successor agencies, and any entity created by one or more such agencies for the purpose of operating, or contracting for the operation of, commuter service.

(9) "Commuter service" means short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets and by morning and evening peak period operations.

(10) "Corporation" means the National Railroad Passenger Corporation created under subchapter III of this chapter.

(11) "Intercity rail passenger service" means all rail passenger service other than commuter service.

(12) "Model Program" means a program carried out by the Corporation under section 646 or section 648 of this title and the employee assistance program established by the Corporation.

(13) "Northeast Corridor" has the meaning given such term in section 851(c) of this title.

(14) "Panel" means a Technical Assistance Panel established under section 563(b) of this title.

(15) "Rail carrier" and "railroad" mean a person providing railroad transportation for compensation.

(16) "Regional transportation agency" means an authority, corporation, or other entity established for the purpose of providing passenger service within a region.

(17) "Route and Service Criteria" means the Criteria and Procedures for Making Route and Service Decisions established pursuant to section 564(c) of this title.

(18) "Secretary" means the Secretary of Transportation or his delegate unless the context indicates otherwise.

SUBCHAPTER II—
BASIC NATIONAL RAIL PASSENGER SYSTEM

Subchapter Referred to in Other Sections

This subchapter is referred to in section 502 of this title.

§ 521. Designation of system

In carrying out the congressional findings and declaration of purpose set forth in subchapter I of this chapter, the Secretary, acting in cooperation with other interested Federal agencies and departments, is authorized and directed to submit to the commission and to the Congress within thirty days after October 30, 1970, his preliminary report and recommendations for the basic system. Such recommendations shall specify those points between which intercity passenger trains shall be operated, identify all routes over which service may be provided, and the trains presently operated over such routes, together with basic service characteristics of operations to be provided within the basic system, taking into account schedules, number of trains, connections, through car service, and sleeping, parlor, dining, and lounge facilities. In recommending the basic system the Secretary shall take into account the need for expeditious intercity rail passenger service within and between all regions of the continental United States, and the Secretary shall consider the need for such service within the States of Alaska and Hawaii and the Commonwealth of Puerto Rico. In formulating such recommendations the Secretary shall consider opportunities for provision of faster service, more convenient service, service

to more centers of population, and service at lower cost, by the joint operation, for passenger service, of facilities of two or more railroad companies; the importance of a given service to overall viability of the basic system; adequacy of other transportation facilities serving the same points; unique characteristics and advantages of rail service as compared to other modes of transportation; the relationship of public benefits of given services to the costs of providing such services; and potential profitability of the service. The exclusion of a particular route, train, or service from the basic system shall not be deemed to create a presumption that the route, train, or service is not required by public convenience and necessity in any proceeding under section 10908 and 10909 of title 49.

§ 522. Review of the basic system

The Commission, the State Commissions, the representatives of the railroads, and labor organizations duly authorized under the Railway Labor Act [45 U.S.C. 151 et seq.] to represent railroad employees shall, within thirty days after receipt of the preliminary report of the Secretary designating the basic system, review such report consistent with the purposes of this chapter and provide the Secretary with their comments and recommendations in writing. The Secretary shall give due considerations to such comments and recommendations. The Secretary shall, within ninety days after October 30, 1970, submit his final report designating the basic system to the Congress. Such final report shall include a summary of their recommendations together with his reasons for failing to adopt any such recommendation. The basic system as designated by the Secretary shall become effective for the purposes of this chapter upon the date that the final report of the Secretary is submitted to Congress and shall not be reviewable in any court.

SUBCHAPTER III—
NATIONAL RAILROAD PASSENGER CORPORATION

Subchapter Referred to in Other Sections

This subchapter is referred to in sections 502, 1104 of this title.

§ 541. Establishment of the Corporation

There is authorized to be created a National Railroad Passenger Corporation. The Corporation shall be operated and managed as a for profit corporation, the purpose of which shall be to provide intercity and commuter rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements. The Corporation will not be an agency, instrumentality, authority, or entity, or establishment of the United States Government. It shall be subject to the provisions of this chapter and, to the extent consistent with this chapter, to the District of Columbia Business Corporation Act [D.C. Code, sec. 29-301 et seq.]. The right to repeal, alter, or amend this chapter at any time is expressly reserved.

§ 542. Incorporation

The President of the United States shall appoint not fewer than three incorporators, by and with the advice and consent of the Senate, who shall also serve as the board of directors for one hundred and eighty days following October 30, 1970. The incorporators shall take whatever actions are necessary to establish the Corporation, including the filing of articles of incorporation, as approved by the President.

(Pub. L. 91-518, title III, § 302, Oct. 30, 1970, 84 Stat. 1330.)

§ 543. Directors and officers

(a) Number; qualifications; appointment; compensation and allowances

(1) The Corporation shall have a board of directors consisting of nine individuals who are citizens of the United States, as follows:

(A) The Secretary of Transportation, ex officio. The Secretary of Transportation may be represented at meetings of the Board by his deputy, the Administrator of the Federal Railroad Administration or the General Counsel of the Department of Transportation.

(B) The President of the Corporation.

(C) Three members appointed by the President, by and with the advice and consent of the Senate, on the following basis;

(i) One to be selected from a list of three qualified individuals recommended by the Railway Labor Executives Association.

(ii) One to be selected from among the Governors of State with an interest in rail transportation. Such Governor may select an individual to represent him at meetings of the Board.

(iii) One to be selected as a representative of business with an interest in rail transportation.

(D) Two members selected by commuter authorities, on the following basis.

(i) Until January 1, 1983, the two members under this subparagraph shall be selected by the President from a list of names consisting of one individual nominated by each commuter authority for which the Consolidated Rail Corporation operates commuter service under the Regional Rail Reorganization Act of 1973 [45 U.S.C. 701 et seq.]. Such

members shall serve until December 31, 1982, or until their successors are appointed pursuant to subparagraph (ii).

(ii) After January 1, 1983, the two members under this subparagraph shall be selected by the President from a list of names consisting of one individual nominated by each commuter authority for which Amtrak Commuter operates commuter service under subchapter V of this chapter and one individual nominated by each commuter authority in the Region (as defined in section 102 of the Regional Rail Reorganization Act of 1973 [45 U.S.C. 702]) which operates its own service or contracts with an operator other than Amtrak Commuter, except that—

(I) if Amtrak Commuter operates commuter service for one or more commuter authorities, at least one of the members selected under this clause shall be an individual nominated by such a commuter authority; and

(II) if Amtrak Commuter does not operate commuter service for any commuter authority, five names shall be submitted to the President by commuter authorities providing service over rail properties owned by Amtrak, and the President shall select two members from such list.

(E) Two members selected by the preferred stockholders of the Corporation, who each shall serve for a term of one year or until successors have been appointed.

(2)(A) Members appointed by the President under paragraph (1)(C) shall serve for terms of four years or until their successors have been appointed and qualified, except that any member appointed by the President under such subparagraph to fill a vacancy shall be appointed only for the unexpired term of the member he is appointed to succeed. Not more than

two of the members appointed under such subparagraph shall be registered as members of the same political party.

(B) Members selected under paragraph (1)(D) shall serve for terms of two years or until their successors have been appointed.

(3) Except as provided in paragraph (2)(A) of this subsection, any vacancy in the membership of the board shall be filled in the same manner as in the case of the original selection.

(4) The President of the Corporation shall serve as chairman of the board of directors.

(5) Each member not employed by the Federal Government shall receive compensation at the rate of $300 per diem when engaged in the actual performance of duties. In addition, each member shall be reimbursed for necessary travel, secretarial or professional staff support which is reasonably required and subsistence expenses incurred in attending meetings of the board.

(6) No member appointed by the President may—

(A) have any direct or indirect financial or employment relationship with any railroad, nor

(B) have any significant direct or indirect financial relationship, or any direct or indirect employment relationship, with any person engaged in the transportation of passengers in competition with the Corporation, during the time that he serves on the board.

(7) Pending the selection of the two members by the preferred stockholders of the Corporation under paragraph (1)(D) of this subsection, four members shall constitute a quorum for the purpose of conducting the business of the board.

(8) Any vacancy in the membership of the board of directors required to be filled by appointment by the President under paragraph (1)(B) of this subsection shall be filled by the President not more than one hundred and twenty days after such vacancy occurs.

(b) Bylaws

The board of directors is empowered to adopt and amend bylaws governing the operation of the Corporation. Such bylaws shall not be inconsistent with the provisions of this chapter or of the articles of incorporation.

(c) Stock conversion and voting rights

The articles of incorporation of the Corporation shall provide for cumulative voting for all stockholders and shall provide that, upon conversion of one-fourth of the outstanding shares of preferred stock, the common stockholders shall be entitled to elect four directors and the preferred stockholders shall be entitled to elect three directors; upon the conversion of one-half of the outstanding shares of preferred stock, the common stockholders shall be entitled to elect five directors and the preferred stockholders shall be entitled to elect two directors; upon the conversion of three-fourths of the outstanding shares of preferred stock, the common stockholders shall be entitled to elect six directors and the preferred stockholders shall be entitled to elect one director; and upon conversion of all outstanding shares of preferred stock, the common stockholders shall be entitled to elect seven directors. Any change of directors resulting from such stock conversion shall take effect at the next annual meeting of the Corporation following such stock conversion.

(d) Appointment; tenure; duties of president and other officers

The Corporation shall have a president and such other officers as may be named and appointed by the board. The rates

of compensation of all officers shall be fixed by the board. The president and other officers of the Corporation shall receive compensation at a level no higher than the general level of compensation paid officers of railroads in positions of comparable responsibility. Officers shall serve at the pleasure of the board. No individual other than a citizen of the United States may be an officer of the Corporation. No officer of the Corporation may have any direct or indirect employment or financial relationship with any railroad during the time of his employment by the Corporation; except that the holding of securities issued by a railroad shall not be deemed to be violative of this prohibition: *Provided*, That the officer who holds such securities recuses himself from any decisions which bear directly on such railroad, and makes full public disclosure of such holdings.

§ 544. Common and preferred stock

(a) Issuance; par value; dividends

The Corporation is authorized to issue and have outstanding, in such amounts as its shall determine, two issues of capital stock, a common and a preferred, which shall be eligible for dividends. Preferred stock may be issued to and held only by and person other than (1) a railroad or (2) any person controlling one or more railroads, as defined in section 10102 of title 49. The articles of incorporation of the Corporation shall provide for the following respective rights of each issue of stock:

(A) COMMON STOCK.—Common stock shall have a par value of $10 per share and shall be designated fully paid and nonassessable. No dividends shall be paid on the common stock whenever dividends on the preferred stock are in arrears.

(B) PREFERRED STOCK.—(i) Preferred stock shall have a par value of $100 per share and shall be designated fully paid and nonassessable. Dividends shall be

fixed at a rate not less than 6 per centum per annum, and shall be cumulative so that, if for any dividend period dividends at the rate fixed in the articles of incorporation shall not have been declared and paid or set aside for payment on the preferred shares, the deficiency shall be declared and paid or set apart for payment prior to the making of any dividend or other distribution on the common shares.

(ii) Preferred stock shall be entitled to a liquidation preference over common stock, which shall entitle preferred stockholders to a liquidating payment not less than par value plus all accrued unpaid dividends prior to any payment on liquidation to common stockholders.

(iii) Preferred stock shall be convertible into shares of common stock at such time and upon such terms as the articles of incorporation shall provide.

(b) Limitations on voting common stock

At no time after the initial issue is completed shall the aggregate of the shares of common stock of the Corporation voted by a single railroad or by any person controlling one or more railroads, as defined in section 10102 of title 49, directly or indirectly through subsidiaries or affiliated companies, nominees, or any person subject to its direction or control, exceed 33 1/3 per centum of such shares issued and outstanding. If any railroad or any person controlling one or more railroads, as defined in section 10102(6) of title 49, owns, directly or indirectly through subsidiaries or affiliated companies, nominees, or any person subject to its direction or control, a number of shares in excess of 33 1/3 per centum of the total number of common shares issued and outstanding, such excess number shall, for voting and quorum purposes, be deemed to be not issued and outstanding.

(c) Preferred stock issued to Secretary; dates of issuance

(1) Not later than February 1, 1982, and in consideration of receiving further Federal financial assistance, the Corporation shall issue to the Secretary a sufficient number of shares of preferred stock to equal, to the nearest whole share, the amount of funds appropriated by Congress for capital acquisitions or improvements, or for operating and capital expenses, under the authority of subsections (a)(2), (b)(1)(B), and (b)(1)(C) of section 601 of this title between October 30, 1970, and September 30, 1981.

(2) Commencing on October 1, 1981, and in consideration of receiving further Federal financial assistance, the Corporation shall issue to the Secretary within 30 days after the close of each quarter of the fiscal year of the United States Government additional preferred stock equal, to the nearest whole share, to the amount of funds paid to the Corporation under section 601 of this title during such quarter.

(3) The preferred stock issued pursuant to paragraphs (1) and (2) of this subsection shall be deemed to have been issued as of the date of receipt by the Corporation of the funds for which such stock is issued.

(4) No amendment to the articles of incorporation of the Corporation shall be required for the issuance of the preferred stock required to be issued pursuant to this subsection.

(d) Issuance of nonvoting securities, bonds, notes, and other certificates of indebtedness; liquidation interest

The Corporation is authorized to issue, in addition to the stock authorized by subsection (a) of this section, nonvoting securities, bonds, debentures, notes, and other certificates of indebtedness as it may determine, except that no obligation with a liquidation interest superior to any preferred stock issued to the Secretary or secured by a lien on property of the Corporation shall be incurred without the consent of the Sec-

retary so long as any preferred stock issued to the Secretary is outstanding.

(e) Rights of inspection and copying; fee or other taxation

(1) The requirement of section 45(b) of the District of Columbia Business Corporation Act (D.C. Code, sec. 29-920(b) [§ 29-345(b)]) as to the percentage of stock a stockholder is required to hold in order to have the rights of inspection and copying set forth in such section shall not be applicable in the case of holders of the stock of the Corporation, and they may exercise such rights without regard to the percentage of stock they hold.

(2) Preferred stock issued under the authority of this section shall not be subject to the annual fee prescribed under section 29-936(3) [§ 29-399.22(e)]) of the District of Columbia Code, or to any other form of taxation unless otherwise specifically prescribed by Congress.

§ 545. General powers

(a) Corporate powers attendant to operation of intercity and commuter trains for the transportation of passengers, mail, and express

The Corporation is authorized to own, manage, operate, or contract for the operation of intercity and commuter trains operated for the purpose of providing modern, efficient, intercity and commuter transportation of passengers and to carry mail and express of such trains; to conduct research and development related to its mission; and to acquire by construction, purchase, or gift, or to contract for the use of, physical facilities, equipment, and devices necessary to rail passenger operations. Insofar as practicable, the Corporation shall directly operate and control all aspects of its rail passenger service. To carry out its functions and purposes, the Corporation shall have the usual powers conferred upon a

stock corporation by the District of Columbia Business Corporation Act [D.C. Code, § 29-301 et seq.].

(b) Revenue increases; auto-ferry service; assistance of Federal departments and agencies

The Corporation shall take such actions as may be necessary to increase its revenues from the carriage of mail and express. In order to increase revenues and to better accomplish the purposes of this chapter, the Corporation is authorized to modify its services to provide auto-ferry service as a part of the basic passenger services authorized by this chapter, except that nothing contained in this chapter shall prevent any other person, other than a railroad (except that for purposes of this section a person primarily engaged in auto-ferry service shall not be deemed to be a railroad), from providing such auto-ferry service over any route in accordance with a certificate issued by the Commission if—

(1) the Commission finds that such auto-ferry service—

(A) will not impair the ability of the Corporation to reduce its losses or to increase its revenues, and

(B) is required to meet the demands of the public, or

(2) such auto-ferry service is being performed by such person on November 3, 1973, under contracts entered into before October 30, 1970.

Nothing in this section shall be construed to restrict the right of a railroad that has not entered into a contract with the Corporation for the provision of rail passenger service from performing auto-ferry service over its own lines. The Corporation is authorized to acquire, lease, modify, or develop the equipment and facilities required for the efficient provision of mail, express, and auto-ferry service, or to enter into contracts for the provision of such service. Upon request by

the Corporation, Federal departments and agencies shall, consistent with the provisions of existing law, provide such assistance as may be necessary in carrying out the purposes of this subsection.

(c) Transportation and reduced fare program for elderly and handicapped individuals

(1) The Corporation is authorized to take all steps necessary to insure that no elderly or handicapped individual is denied intercity transportation on any passenger train operated by or on behalf of the Corporation, including but not limited to, acquiring special equipment and devices and conducting special training for employees; designing and acquiring new equipment and facilities and eliminating architectural and other barriers in existing equipment and facilities to comply with the highest standards for the design, construction, and alteration of property for the accommodation of elderly and handicapped individuals; and providing special assistance while boarding and alighting and in terminal areas to elderly and handicapped individuals.

(2)(A) Within 90 days after September 29, 1979, the Corporation shall establish a reduced fare program for elderly and handicapped individuals.

(B) For purposes of this paragraph—

(i) the term "elderly individual" means a person who has attained the age of 65 years; and

(ii) the term "handicapped individual" means any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has record of such an impairment, or is regarded as having such an impairment, but the term handicapped individual does not include any person who is an alcoholic or drug abuser.

(d) Acquisition of property; declaration of taking; property compensation; procedures; transfer of title

(1) The Corporation is authorized, to the extent financial resources are available--

(A) to acquire any property which the Secretary, acting in furtherance of his responsibility to design and construct an intermodal transportation terminal at Union Station in the District of Columbia, requests, upon assurance of full reimbursement by the Secretary; and

(B) to acquire any right-of-way, land, or other property (except right-of-way, land, or other property of a railroad or property of a State or political subdivision thereof or of any other governmental agency), which is required[3] intercity rail passenger service; by the exercise of the right of eminent domain, in accordance with the provisions of this subsection, in the district court of the United States for the judicial district in which such property is located or in any such court if a single piece of property is located in more than one judicial district: *Provided*, that such right may only be exercised when the Corporation cannot acquire such property by contract or is unable to agree with the owner as to the amount of compensation to be paid.

(2) The Corporation shall file with the complaint, or at any time before judgment, a declaration of taking containing or having annexed thereto—

(A) a statement of the public use for which the property is taken;

(B) a description of the property taken sufficient for the identification thereof;

(C) a statement of the estate or interest in the property taken;

(D) a plan showing the property taken; and

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[3] So in original. Probably should be "required for".

(E) a statement of the amount of money estimated by the Corporation to be just compensation for the property taken.

(3) Upon the filing of the declaration of taking and the depositing in the court of the amount of money estimated in such declaration to be just compensation for the property, the property shall be deemed to be condemned and taken for the use of the Corporation. Title to such property shall thereupon vest in the Corporation in fee simple absolute or in any lesser estate or interest specified in the declaration of taking, and the right to the money deposited as estimated just compensation shall immediately vest in the persons entitled thereto. The court, after a hearing, shall make a finding as to the amount of money which constitutes just compensation for such property and shall make an award and enter judgment accordingly. Such judgment shall include, as part of the just compensation awarded, interest on the amount finally awarded as the value of the property on the date of taking minus the amount deposited in the court on such date, at the rate of 6 per centum per annum from the date of taking to the date of payment.

(4) Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceeding. If the compensation finally awarded exceeds the amount of the money received by any person entitled to compensation, the court shall enter judgment against the Corporation for the amount of the deficiency.

(5) Upon the filing of a declaration of taking, the court may fix the time within which, and the terms upon which, the parties in possession are required to surrender possession to the Corporation. The court may make such orders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

(e) Improvement of service and equipment; research and development; demonstration programs; international rail passenger service; other corporate purposes

The Corporation is authorized to take all steps necessary to—

(1) establish improved reservations systems and advertising;

(2) service, maintain, repair, and rehabilitate railroad passenger equipment;

(3) conduct research and development and demonstration programs respecting new rail passenger services;

(4) develop and demonstrate improved rolling stock;

(5) establish and maintain essential fixed facilities for the operation of passenger trains on lines and routes included in the basic system, over which no through passenger trains are being operated on October 30, 1970, including necessary track connections between lines on the same or different railroads;

(6) purchase or lease railroad rolling stock;

(7) develop and operate international intercity rail passenger service between points within the United States and points in Canada and Mexico, including Montreal, Canada; Vancouver, Canada; and Nuevo Laredo, Mexico (for purposes of section 564(b) of this title, such international rail passenger service is service included within the basic system); and

(8) to carry out other corporate purposes.

(f) Operational improvement program; comprehensive plan, submittal to President and Congress

The Corporation shall, not later than January 1, 1981, develop and submit to the Congress and to the President a comprehensive plan for the improvement of all intercity rail passenger service provided in the basic system. The Corpo-

ration shall commence implementation of such plan as soon as practicable after all or any portion thereof is developed. Such plan shall include—

(1) a zero-based assessment of all operating practices and implementation of changes to achieve the minimum use of employees consistent with safe operations and adequate service;

(2) a systematic program for optimizing the ratio of train size to passenger demand;

(3) a systematic program for trip time reduction on all trains in the basic system;

(4) establishment of training programs to achieve on-time departures and priorities for passenger trains over freight trains en route;

(5) adjustment of purchasing and pricing of food and beverages to achieve, as soon as practical after September 29, 1979, a continuing reduction in losses associated with food and beverage services with a goal of ultimate profitability;

(6) cooperative marketing opportunities between the Corporation and governmental entities at all levels having intercity rail passenger service; and

(7) cooperative marketing campaigns sponsored by the Corporation and the Department of Energy, the Federal Highway Administration and the Environmental Protection Agency.

(g) Maintenance, rehabilitation, repair and refurbishment of rail passenger equipment

The Corporation shall, not later than January 1, 1980, establish a Regional Maintenance Plan. Such plan shall include—

(1) a review panel at corporate headquarters consisting of such members as the President of the Corporation shall designate;

(2) a systemwide inventory of spare equipment parts by operational regions;

(3) establishment of the necessary number of maintenance employees per number of cars and locomotives per region;

(4) establishment of a systematic preventive maintenance program;

(5) a method for periodic evaluation of maintenance costs, time lags, and parts shortages with appropriate corrective actions; and

(6) such other elements or activities as the Corporation considers appropriate.

(h) Northeast Corridor project; completion and implementation; assistance by Corporation

The Corporation shall advise, consult and cooperate with, and, upon request, is authorized to assist in any other manner the Secretary, the United States Railway Association, the Corps of Engineers, and the Consolidated Rail Corporation in order to facilitate completion and implementation of the Northeast Corridor project, as defined in section 716(a)(3) of this title, by the earliest practicable date. The Secretary shall assign the highest priority to the completion of such project.

(i) Customs inspection and immigration procedures

The Secretary of the Treasury and the Attorney General shall (consistent with the effective enforcement of the immigration and customs laws) establish and maintain, in cooperation with the Corporation, en route customs inspection and immigration procedures aboard trains operated in international intercity rail passenger service, which procedures will

be convenient for passengers and will result in the most rapid possible transit in international intercity rail passenger service.

(j) Railroad police; employment by Corporation

The Corporation is authorized to employ railroad police for purposes of providing security and protection for rail passengers of the Corporation and for rail properties owned by the Corporation. Railroad police employed by the Corporation who have complied with the provisions of any State law setting forth licensing, residency, or related requirements applicable to railroad police or persons employed in similar positions may be employed without regard to the provisions of any other State's laws setting forth such requirements.

(k) Purchase of articles, materials and supplies mined, manufactured or produced in United States; exceptions

(1) Except as provided in paragraph (2) or (3) of this subsection, the Corporation shall purchase only—

(A) unmanufactured articles, materials, and supplies which have been mined or produced in the United States; and

(B) manufactured articles, materials, and supplies which have been manufactured in the United States substantially all from articles, materials, and supplies mined, produced, or manufactured, as the case may be, in the United States.

(2) The Secretary may, upon application of the Corporation, exempt the Corporation from the requirements of paragraph (1) of this subsection with respect to the purchase of particular articles, materials, or supplies, if the Secretary determines that—

(A) imposing such requirements with respect to such articles, materials, or supplies is inconsistent with the public interest;

(B) the cost of imposing such requirements with respect to such articles, materials, or supplies is unreasonable; or

(C) such articles, materials, or supplies or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(3) In addition to the exemptive authority set forth in paragraph (2), the Secretary may, upon application of the Corporation, exempt the Corporation from the requirements of paragraph (1) of this subsection with respect to the purchase of rolling stock or power train equipment if the Secretary determines that such rolling stock or power train equipment, as the case may be, cannot be purchased and delivered in the United States within a reasonable time.

(4) The provisions of this subsection shall not apply—

(A) in any case in which the cost of the articles, materials, or supplies purchased is less than $1,000,000; or

(B) in the case of articles, materials, or supplies purchased pursuant to a contract entered into before October 5, 1978.

(5) For purposes of this subsection, the terms "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(l) Repealed. Pub. L. 99-272, title IV, § 4007(e)(1), Apr. 7, 1986, 100 Stat. 108

(m) Adequacy of service reports

For purposes of assessing the operational performance of trains, the President of the Corporation shall have the authority to direct the conductor on any Amtrak train to report to the Corporation any inadequacy of train operation. Adequacy of service reports required under this subsection shall be promptly transmitted to the Corporation. Each report shall be signed by the conductor and contain sufficient information to locate equipment or personnel failures.

(n) Food and beverage service; revenues

The Corporation shall implement policies which will eliminate the deficit in its on-board food and beverage operations no later than September 30, 1982. Beginning October 1, 1982, food and beverage services shall be provided on-board Amtrak trains only if the revenues from such service are equal to or greater than the total costs of such services as computed on an annual basis.

§§ 545a. Mail Service

The National Railroad Passenger Corporation shall utilize all feasible means, including taking into account the needs of the United States Postal Service in establishing schedules, to attract and service the bulk mail needs of the Postal Service.

§ 546. Laws applicable

(a) Corporation deemed common carrier subject to interstate commerce provisions; exceptions

The Corporation shall be deemed a common carrier by railroad within the meaning of section 10102 of title 49 and shall be subject to all provisions, including the provisions of sections 10721-10724 of title 49 other than those pertaining to—

(1) regulation of rates, fares, and charges;

(2) abandonment or extension of lines of railroads utilized solely for passenger service, and the abandonment or extension of operations over such lines of railroads, whether by trackage rights or otherwise;

(3) regulation of routes and service and the discontinuance or change of passenger train service operations; and

(4) the issuance of securities or the assumption of any obligation or liability with respect to the securities of others.

(b) Interstate commerce provisions relating to safety and employee relations

The Corporation shall be subject to the same laws and regulations with respect to safety and with respect to the representation of its employees for purposes of collective bargaining, the handling of disputes between carriers and their employees, employee retirement, annuity and unemployment systems, and other dealings with its employees as any other common carrier subject to subchapter I of chapter 105 of title 49.

(c) State or other laws relating to rates, routes, and service inapplicable

The Corporation shall not be subject to any State or other law pertaining to the transportation of passengers by railroad as it relates to rates, routes, or service.

(d) District of Columbia laws relating to leases and contracts

Leases and contracts entered into by the Corporation, regardless of the place where the same may be executed, shall be governed by the laws of the District of Columbia.

(e) Certain users and operators of facilities and equipment exempt from prohibitions of existing law

Persons contracting with the Corporation for the joint use or operation of such facilities and equipment as may be necessary for the provision of efficient and expeditious passenger service shall be and are hereby relieved from all prohibitions of existing law, including the antitrust laws of the United States, with respect to such contracts, agreements, or leases insofar as may be necessary to enable them to enter into such contracts and to perform their obligations thereunder.

(f) Travel by train; contract air program

All departments, agencies, and instrumentalities of the Federal Government shall, in authorizing travel in the continental United States for their employees or for members of the Armed Forces or commissioned services, treat travel by train (whether or not extra fare trains) on the same basis as travel by other authorized modes, which shall include allowing the Corporation to participate in the contract air program administered by the General Services Administration in markets where service provided by the Corporation is competitive as to rates and total trip times.

(g) Freedom of information provisions

The Corporation shall be subject to the provisions of section 552 of title 5.

(h) Auto-ferry service; pre-emption of State law

No common carrier by railroad may refuse to participate with the Corporation in providing auto-ferry service on the grounds that a State or local law or regulation makes the service unlawful; and neither the Corporation nor such railroad shall be subject to any fine, penalty, or other sanction for violation of a State or local law or regulation which has the

effect of prohibiting or impairing the provision of auto-ferry service.

(i) Communicable disease control requirements; applicability to intercity rail passenger service; disposal of human waste

The provisions of section 361 of the Public Health Service Act (42 U.S.C. 264) and other Federal, State and local laws shall not apply to waste disposal from railroad conveyances operated in intercity rail passenger service. New intercity rail passenger cars manufactured on or after October 15, 1990, shall be built to provide for the discharge of human wastes only at servicing facilities. The Corporation shall retrofit those of its intercity rail passenger cars that were manufactured after May 1, 1971 and before October 15, 1990, with human waste disposal systems that provide for the discharge of human wastes only at servicing facilities. Subject to the appropriation of funds, (1) such retrofit program shall be completed within not later than October 15, 1996, and (2) all cars that do not provide for the discharge of human wastes only at servicing facilities shall be removed from service after such date. The United States district courts shall have original jurisdiction over any civil actions brought by the Corporation to enforce the exemption conferred hereunder and may grant equitable or declaratory relief as requested by the Corporation.

(j) Intercity through routes and joint fares; cooperation between Corporation and other intercity common carriers of passengers

(1) The establishment of through routes and joint fares, between the National Railroad Passenger Corporation and other intercity common carriers of passengers by rail and motor carriers of passengers, is consistent with the public interest and the national transportation policy. The Congress encourages the making of such arrangements.

(2) The Corporation may establish through routes and joint fares with any any[4] domestic or international motor, air, or water carrier.

(k) Repealed. Pub. L. 99-272, title IV, § 4007(b), Apr. 7, 1986, 100 Stat. 108

(l) State or local laws relating to pay periods or pay days inapplicable; frequency of payments

The Corporation shall not be subject to any State or local law relating to pay periods or days for payment of employees. No employee of the Corporation shall be paid less frequently than such employee is paid as of October 1, 1979, other than pursuant to an applicable collective bargaining agreement.

(m) Business activity and qualification; District of Columbia as principal office and place of business for process and citizenship for original Federal jurisdiction

The Corporation shall be deemed to be qualified to do business in each State in which it performs any activity authorized under this chapter. In connection with the performance of such activities, the Corporation shall accept service of process addressed by certified mail to the secretary of the Corporation at its principal office and place of business in Washington, District of Columbia. The Corporation shall be deemed to be a citizen only of the District of Columbia for the purpose of determining the original jurisdiction of the district courts of the United States in civil actions to which the Corporation is party.

(n) Additional Taxes

(1) The Corporation shall not be required to pay any additional taxes as a consequence of its expenditure of funds to acquire or improve real property, equipment, facilities, or

[4] So in original.

right-of-way materials or structures used directly or indirectly in the provision of rail passenger service. For purposes of this subsection, "additional taxes" means taxes or fees (A) on the acquisition, improvement, ownership, or operation of personal property by the Corporation; and (B) on real property other than taxes or fees on the acquisition of real property, or on the value of real property which is not attributable to improvements made, or the operation of such improvements, by the Corporation.

(2) For purposes of this subsection, the term "Corporation" includes the Corporation's railroad subsidiaries and any lessors and lessees of the Corporation or its railroad subsidiaries.

§ 546b. Exemption from taxes or other fees imposed by any state, political subdivision, or local taxing authority levied on the Corporation or any railroad subsidiary; covered period; jurisdiction to enforce exemption

Notwithstanding any other provision of law, the National Railroad Passenger Corporation ("the Corporation") shall be exempt from any taxes or other fees imposed by any state, political subdivision of a state, or local taxing authority which are levied on the Corporation, or any railroad subsidiary thereof, from and after October 1, 1981, including such taxes and fees levied after September 30, 1982: provided, however, That notwithstanding any provision of law, the Corporation shall not be exempt from any taxes or other fees which it is authorized to pay as of September 10, 1982. Taxes and Fees levied on the Corporation or any railroad subsidiary thereof by States, political subdivisions of States, or local taxing authorities with respect to periods beginning prior to October 1, 1981, shall be payable in proportion to the part of the relevant tax period which elapsed prior to such date. Notwithstanding the provision of section 1341 of title 28, the United States district courts shall have original jurisdiction over any

civil actions brought by the Corporation to enforce the exemption conferred hereunder and may grant equitable or declaratory relief as requested by the Corporation.

§ 547. Jurisdiction of the district courts of the United States to impose sanctions

(a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat. Any discontinuance of routes, trains or services or reduction in frequency of service, which is made by the Corporation shall not be reviewable in any court except on petition of the Attorney General of the United States.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter.

§ 548. Reports to the President and the Congress

(a) Intercity passenger service

The Corporation shall submit to the Congress a report not later than February 15 of each year. The report shall include, for each route on which the Corporation operated intercity rail passenger service during the preceding fiscal year, data on

ridership, passenger miles, short-term avoidable profit or loss per passenger mile, revenue-to-cost ratio, revenues, the Federal subsidy, the non-Federal subsidy, and on-time performance. Such report shall also provide all relevant information concerning any decision to pay to any officer of the Corporation compensation at a rate in excess of that prescribed for level I of the Executive Schedule under section 5312 of title 5, specify significant operational problems which have been identified by the Corporation, together with proposals by the Corporation to resolve such problems.

(b) Annual report

The Corporation shall transmit to the President and to the Congress by February 15 of each year (beginning with 1973), and at such other times as it deems desirable, a comprehensive and detailed report of its operations, activities, and accomplishments under this chapter, including a statement of receipts and expenditures for the preceding fiscal year. At the time of its annual report, the Corporation shall submit such legislative recommendations as it deems desirable, including the amount of financial assistance needed for operations and for capital improvements, the manner and form in which the amount of such assistance should be computed, and the sources from which such assistance should be derived.

(c) Balanced national transportation system

The Secretary shall transmit to the President and to the Congress by March 15 of each year (beginning with 1974) a report on the effectiveness of this chapter in meeting the requirements for a balanced national transportation system, together with any legislative recommendations. Beginning in 1976, the Secretary's report on the Corporation shall be made part of the Department of Transportation annual report to the Congress.

SUBCHAPTER IV—PROVISION OF RAIL PASSENGER SERVICES

§ 561. Assumption of intercity rail passenger service by Corporation.

(a) Contracts; passenger deficit payments; determination of the amount, referral to the Interstate Commerce Commission; payment schedule

(1) On or before May 1, 1971, the Corporation is authorized to contract and, upon written request therefor from a railroad, shall tender a contract to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service. On or after March 1, 1973, but before January 1, 1975, the Corporation is authorized to contract, and upon written request therefor, shall tender a contract to relieve the railroad of its entire responsibility for the provision of intercity rail passenger service and such relief shall become effective upon the date on which such contract is entered into. Contracts may be entered into on or before May 1, 1971, notwithstanding the fact that the decision of the Commission under section 502(4) of this title with respect to avoidable loss has not become final. Any contract entered into before such decision of the Commission has become final shall be subject to adjustment to assure that the contract is consistent with such final decision of the Commission. The contract may be made upon such terms and conditions as necessary to permit the Corporation to undertake passenger service on a timely basis. Upon its entering into a valid contract (including protective arrangements for employees), the railroad shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under subtitle IV of title 49 or any State or other law relating to the provision of intercity passenger service: *Provided*, That any railroad discontinuing a train hereunder must give notice in accordance with the notice procedures contained in section 10908 of title 49.

(2) In consideration of being relieved of this responsibility by the Corporation, the railroad shall agree to pay to the Corporation each year for three years an amount equal to one-third of 50 per centum of the fully distributed passenger service deficit of the railroad as reported to the Commission for the year ending December 31, 1969. The payment to the Corporation may be made in cash or, at the option of the Corporation, by the transfer of rail passenger equipment or the provision of future service as requested by the Corporation. Unless the railroad waives all rights to receive stock in exchange for its payments, the railroad shall receive common stock from the Corporation in an amount equivalent in par value to each payment.

(3) In agreeing to pay the amount specified in paragraph (2) of this subsection, a railroad may reserve the right to pay a lesser sum to be determined by calculating either of the following:

(A) 100 per centum of the avoidable loss of all intercity rail passenger service operated by the railroad during the period January 1, 1969, through December 31, 1969; or

(B) 200 per centum of the avoidable loss of the intercity rail passenger service operated by the railroad during the period January 1, 1969, through December 31, 1969, covering all intercity service over the routes between those points between which the Secretary, under sections 521 and 522 of this title, has specified that intercity passenger trains shall be operated within the basic system.

If the amount owed the Corporation under either of these alternatives is agreed by the parties to be less than the amount paid pursuant to paragraph (2), the Corporation shall pay the difference to the railroad and the railroad shall surrender to the Corporation an amount of stock, at par value, equivalent to such payment. If the railroad and the Corporation are

unable to agree as to the amount owed, the matter shall be referred to the Interstate Commerce Commission for decision. The Commission, upon investigation, shall decide the issue within ninety days following the date of referral, or within such additional time as the Commission may order not to exceed an aggregate of one hundred and eighty days following such date of referral, and its decision shall be binding on both parties.

(4) The payments to the Corporation shall be made in accordance with a schedule to be agreed upon between the parties. Unless the parties otherwise agree, the payments for each of the first twelve months following the date on which the Corporation assumes any of the operational responsibilities of the railroad shall be in cash and not less than one thirty-sixth of the amount owed.

(b) Commencement of operations

On May 1, 1971, the Corporation shall begin the provision of intercity rail passenger service between points within the basic system unless such service is being provided (i) either by a railroad with which it has not entered into a contract under subsection (a) of this section or (ii) by a regional transportation agency, provided such agency gives satisfactory assurance to the Corporation of the agency's financial and operating capability to provide such service, and of its willingness to cooperate with the Corporation and with other regional transportation agencies on matters of through train service, through car service, and connecting train service. The Corporation may at any time subsequent to May 1, 1971, contract with a regional transportation agency to provide intercity rail passenger service between points within the basic system included within the service of such agency.

(c) Others prohibited from conducting intercity rail passenger service

Except as provided in section 545(b) of this title concerning auto-ferry service, no railroad or any other person may, without the consent of the Corporation, conduct intercity rail passenger service over any route over which the Corporation is performing scheduled intercity rail passenger service pursuant to a contract under this section.

§ 562. Facilities and service agreements

(a) Contracts with railroads or regional transportation agencies; authority of Interstate Commerce Commission; fixing of compensation; agreements with State, local or regional transportation agencies; disagreement procedures; criteria for compensation

(1) The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree, which terms shall include a penalty for untimely performance. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad or agency under such order or under an order issued under subsection (b) of this section shall be conditioned upon payment by the Corporation of the compensation fixed by the Commission. In fixing just and reasonable compensation for the provision of services or for the use of tracks and facilities ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in

determining the amount (if any) of such compensation. If the amount of compensation fixed is not duly and promptly paid, the railroad or agency entitled thereto may bring an action against the Corporation to recover the amount properly owed. (2) Notwithstanding any other provision of this chapter, the Corporation may enter into agreements with any other railroads and with any State (or local or regional transportation agency) responsible for providing commuter rail or rail freight services over tracks, rights-of-ways, and other facilities acquired by the Corporation pursuant to authority granted by the Regional Rail Reorganization Act of 1973 [45 U.S.C. 701 et seq.] and the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 et seq.]. In the event of a failure to agree, the Commission shall order that rail services continue to be provided, and it shall, consistent with equitable and fair compensation principles, decide, within 120 days after the date of submission of a dispute to the Commission, the proper amount of compensation for the provision of such services. The Commission, in making such a determination, shall not permit cross subsidization between intercity rail passenger service and rail freight services. The Commission, in making such a determination, shall assign to a freight railroad obtaining services pursuant to this paragraph the costs incurred by the Corporation solely for the benefit of that railroad, plus a proportionate share of all other costs of providing services covered by this paragraph that are incurred for the common benefit of the Corporation and such freight railroad. The proportionate share of such other costs assigned to a freight railroad shall be based on relative measures of volume of car operations, tonnage, or other factors that reasonably reflect the relative use of the rail properties covered by this paragraph. Nothing in this paragraph shall be construed to preclude parties from entering into an agreement under this paragraph either before or after a determination of the Commission under this paragraph.

(b) Immediate availability of tracks and other facilities

To facilitate the initiation of operations by the Corporation within the basic system, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable.

(c) Emergency measures

To facilitate such operations by the Corporation as may be deemed by it to be necessary in an emergency, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities for the duration of such emergency. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable including indemnification of the railroad by the Corporation against any casualty risk to which it may be exposed.

(d) Disagreement procedures

(1) If the Corporation and a railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—

(A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and

(B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative prop-

erty (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title,

the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation. The Corporation may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this chapter.

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation, interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

(e) Preferences for intercity or commuter passenger trains

(1) Except in an emergency, intercity or commuter passenger trains operated by or on behalf of the Corporation shall be accorded preference over freight trains in the use of any given line of track, junction, or crossing, unless the Secretary has issued an order to the contrary in accordance with paragraph (2) of this subsection.

(2) Any railroad whose rights with regard to freight train operation are affected by paragraph (1) of this subsection may file an application with the Secretary requesting appropriate relief. If, after hearing under section 553 of title 5, the Secretary finds that adherence to such paragraph (1) will materially lessen the quality of freight service provided to

shippers, the Secretary shall issue an order fixing rights of trains, on such terms and conditions as are just and reasonable.

(f) Accelerated speeds

If, upon request of the Corporation, a railroad refuses to permit accelerated speeds by trains operated by or on behalf of the Corporation, the Corporation may apply to the Secretary for an order requiring the railroad to permit such accelerated speeds. The Secretary shall make findings as to whether such accelerated speeds are unsafe or otherwise impracticable, and with respect to the nature and extent of improvements to track, signal systems, and other facilities that would be required to make such accelerated speeds safe and practicable. After hearing, the Secretary shall issue an order fixing maximum permissible speeds of Corporation trains, on such terms and conditions as he shall find to be just and reasonable.

(g) Operation of additional trains

Upon receipt of an application from the Corporation in any situation where the Corporation is unable to obtain a satisfactory, voluntary agreement from a rail carrier for operation of additional trains on the rail lines of that rail carrier, the Secretary may, after a hearing on the record, order such rail carrier, within 60 days, to permit or provide requested operation of trains of the Corporation over such rail lines on schedules based upon legally permissible operating times. If the Secretary determines not to hold a hearing, the Secretary, within 30 days after receipt of an application from the Corporation, shall publish in the Federal Register his reasons for not holding a hearing. Any such hearing must include a consideration of whether such an order would unduly impair freight operations of the rail carrier involved, and the burden shall be on the rail carrier seeking to oppose the operation of an additional train to demonstrate that the requested operation

will impair freight operations. In establishing such scheduled running times, the Secretary shall give proper consideration to the statutory goal that the Corporation shall implement schedules which will attain a system-wide average speed of at least 55 miles per hour which can be adhered to with a high degree of reliability and passenger comfort. The compensation payable by the Corporation to a rail carrier for an operation ordered pursuant to this subsection shall be that which is properly established pursuant to an agreement between the Corporation and such rail carrier, or, in the absence of an applicable agreement, shall be determined by the Commission in a proceeding pursuant to subsection (a) of this section.

§ 563. State supported services

(a) Route additions

Except as otherwise provided in this chapter, after October 1, 1981, all route additions shall be in accordance with the Route and Service Criteria.

(b) Application for institution or retention of services; contents; review; agreement of Corporation with State; financing; fare increases

(1)(A) Any State or group of States, any regional or local agency, or any other person may submit an application to the Corporation requesting the institution of rail passenger service or the retention of a route, train, or service, or some portion of such route, train, or service, which the Corporation intends to discontinue under section 564 of this Act.

(B) Each application by a State, agency, or person for rail passenger service under this subsection shall contain—

(i) adequate assurances by such State, agency, or person that it has sufficient resources to meet it share of the cost of such service for the period such service is to be provided;

(ii) a market analysis acceptable to the Corporation to ensure that there is adequate demand to warrant such service; and

(iii) a statement by such State, agency, or person that it agrees to pay in each year of operation of such service at least—

(I) 45 percent in the first year of operation; and

(II) 65 percent in each year of operation thereafter;

of the short-term avoidable losses of operating such service and, except as provided in section 601(a) of this title, 50 percent of the associated capital costs.

(2)(A) The Corporation shall review each application submitted by a State, agency, or person for the institution or retention of service under this subsection to determine whether—

(i) the application complies with the requirements of paragraph (1)(B) of this subsection; and

(ii) there is a reasonable probability that the service requested can be provided with the resources available to the Corporation.

(B) Any application submitted by a group of States shall be considered in the same manner as an application submitted by a single State, and not on the basis of whether each State that is a party to such application meets the requirements of paragraph (1)(B) of this subsection.

(3)(A) The Corporation may enter into an agreement with such State, agency, or person for the institution or retention of such service, in accordance with the funding formula set forth in paragraph (1)(B) of the subsection, if the Corporation determines that such service can be provided with resources available to the Corporation.

(B) An agreement entered into pursuant to this subsection may by mutual agreement be renewed for one or more additional terms of not more than 2 years.

(C) If more than one application is made for service and all applications are consistent with the requirements of this subsection, but all the services applied for cannot be provided with the available resources of the Corporation, the board of directors shall decide in its discretion which application or applications best serve the public interest and can be provided with the available resources of the Corporation.

(4)(A) Any funds provided by the Corporation under an agreement with a State, an agency or a person pursuant to this subsection which are allocated for associated capital costs and which are not expended during the fiscal year for which they are provided shall remain available until expended.

(B) The board of directors shall, after consultation with the appropriate officials of each State that contributes to the operation of service under this subsection, establish the basis for determining the short-term avoidable loss and associated capital costs of service operated under this subsection and the total revenues from such service. In addition, the Corporation shall provide appropriate State officials with the basis for determining such loss, costs, and revenues for each route on which service is operated under this subsection.

(5)(A) Prior to instituting any fare increase that applies to service provided under this subsection and that represents an increase of more than 5 percent over a 6-month period, the Corporation shall consult with and obtain the views of the appropriate officials of each State to be affected by such fare increase. The Corporation shall provide the officials of each such State with an explanation of the circumstances warranting the proposed fare increase (such as the unique costs of or demand for the services involved).

(B) A proposed fare increase described in subparagraph (A) shall take effect 90 days after the date the Corporation

first consults with the affected States pursuant to such subparagraph. Within thirty days of the initial consultation, the affected State may submit proposals to the Corporation for reducing costs and increasing revenues in connection with service provided under this subsection. Following such thirty-day period, the Corporation, after taking into consideration such proposals as may be submitted by a State, shall decide whether to implement the proposed fare increase in whole or in part.

(C) Notwithstanding the provision of subparagraph (B) of this paragraph, the Corporation may increase fares pursuant to this paragraph during the first month of a fiscal year if the authorization for appropriations or the appropriations for the benefit of the Corporation for such fiscal year are not enacted at least 90 days prior to the beginning of such fiscal year, and the Corporation may increase fares pursuant to this paragraph during the 30 days following enactment of any appropriation for the benefit of the Corporation or rescission thereof. Notice of fare increases pursuant to the preceding sentence shall be given by the Corporation to any affected State as soon as possible following the decision to effect such fare increase.

(6) At least 2 but not more than 5 percent of all revenues generated by each particular route operated under the authority of this subsection shall be dedicated to advertising and promotion of such service on a local level.

(c) Repealed. Pub. L. 96-73, title I, § 115(c), Sept. 29, 1979, 93 Stat. 544

(d) Continuance of service; funding

Beginning October 1, 1981, the Corporation shall continue to operate rail passenger service operated under this subsection prior to October 1, 1981, if such service meets the criterion set forth in section 564(d)(2) of this title, after taking into account projected fare increases and any State or local contributions to such service. Beginning October 1, 1986, if

such service is not projected to meet such criterion, the Corporation may discontinue, modify, or adjust such service so that the applicable criterion will be met. Any service continued under this subsection shall be funded in accordance with the method of funding in effect on the day prior to October 1, 1981. Notwithstanding the second sentence of this subsection, on any date between October 1, 1993, and September 30, 1995, if the service operated pursuant to this paragraph on a route during the previous 6-month period has a short-term avoidable loss, the Corporation may elect to consider discontinuance, modification, or adjustment of such service. If such election is made, the Corporation shall solicit public comment on alternatives to discontinuance, modification, or adjustment of such service. The public comment period shall be at least 30 days. Within 60 days after the expiration of that comment period, the Corporation may discontinue, modify, or adjust such service so that there is no short-term avoidable loss for operation of service pursuant to this subsection on the route. For purposes of this paragraph the calculation of short-term avoidable loss shall not include the cost of providing passenger equipment required to operate such service.

§ 564. Addition to or discontinuance of routes and services

(a) Discontinuance of service

Unless it has entered into a contract with the Corporation pursuant to section 561(a)(1) of this title, no railroad may discontinue any intercity passenger train whatsoever prior to January 1, 1975, the provisions of any other Act, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, a Federal or State court, agency, or authority to the contrary notwithstanding. On and after January 1, 1975, passenger train service operated by such railroad may be discontinued under the provisions of sections 10908 and 10909 of title 49. Upon filing of a notice of discontinuance by such railroad, the Corporation may

undertake to initiate passenger train operations between the points served.

(b) Route and Service Criteria for route discontinuances

After October 1, 1979, all route discontinuances by the Corporation shall be in accordance with the Route and Service Criteria.

(c) Development of specific proposals; operation within available resources; review of routes; reduction of costs; notice of service discontinuance

(1) Within 120 days after May 26, 1975, the board of directors of the Corporation shall study, develop, and submit to the Secretary, to the Commission, and to the Congress an initial proposal setting forth criteria and procedures under which the Corporation would be authorized to add or discontinue routes and services. Such criteria and procedures shall include, but need not be limited to—

(A) methods for evaluating the economic and environmental impact of any addition or discontinuance of intercity rail passenger service including an evaluation of the economic impact to the Corporation and to the nation of the addition of new service points along existing or new intercity routes within the Northeast Corridor;

(B) methods for evaluating the effects of any such addition or discontinuance on connecting parts of the national system of intercity rail passenger service;

(C) methods for estimating, with respect to any such addition or discontinuance, the population to be affected, the demand for intercity rail passenger service, the revenue per passenger mile, and the effect on capital costs and revenue of the Corporation;

(D) methods for evaluating the availability of alternative modes of transportation;

(E) methods for giving public notice of, and obtaining public comments on, any such addition or discontinuance; and

(F) methods for establishing a priority ranking system for routes and trains to meet the needs of the public convenience and necessity for a balance transportation system, taking into consideration the criteria and procedures referred to in subparagraphs (A) through (E) of this paragraph, together with such other criteria as the board of directors deems appropriate.

(2) Within 150 days after May 26, 1975, the Secretary and the Commission shall submit to the Congress and to the board of directors of the Corporation their comments on the initial proposal setting forth criteria and procedures developed by the board of directors of the Corporation, together with such recommendations as they may deem appropriate.

(3)(A) Within 30 days after receipts of comments submitted by the Secretary and the Commission under paragraph (2) of this subsection, the board of directors of the Corporation shall consider such comments and shall submit to the Congress a final proposal setting forth criteria and procedures under which the Corporation would be authorized to add or discontinue routes and services within the national system of intercity rail passenger service. The criteria and procedures set forth in such final proposal shall take effect at the end of the first period of 60 calendar days of continuous session of the Congress after the date of its submission, unless either the Senate or the House of Representatives adopts a resolution during such period stating that it does not approve such final proposal. If no resolution is adopted as provided in the preceding sentence, the Corporation may add or discontinue routes and services in accordance with the criteria and procedures set forth in the final proposal, notwithstanding the provisions of sections 10908 and 10909 of title 49 or of subsection (b)(3) of this section, relating to discontinuance of

service within the basic system. Service beyond the basic system referred to in subsection (b)(2) of this section shall not be discontinued under this subsection until March 1, 1977. For purposes of this paragraph, continuity of session of the Congress is broken only by an adjournment sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded from the computation of the 60-day period.

(B) Beginning on October 1, 1981, if the Corporation determines that an amendment to the Route and Service Criteria is necessary or appropriate, it shall submit a draft of such amendment to the Congress. Such amendment shall take effect at the end of the first period of 120 calendar days of continuous session of the Congress after the date of its submission, unless the Senate and the House of Representatives adopt a joint resolution during such period stating that they do not approve such amendment. For purposes of this subparagraph, continuity of session of the Congress is broken only by an adjournment sine die and the days on which either House is not in session because of adjournment of more than 3 days to a day certain are excluded in the computation of such 120-day period.

(4)(A) The Corporation's annual total costs shall not exceed the funds, including grants made under section 601 of this title, contributions provided by States, regional and local agencies and other persons, and revenues, available to the Corporation within the then-current fiscal year. Commencing in fiscal year 1982, the Corporation shall recover an amount sufficient that the ratio of its revenues, including contributions from States, agencies, and other persons, to costs, excluding capital costs, shall be at least 50 percent. Commencing in fiscal year 1986, the Corporation shall set a goal of recovering an amount sufficient that the ratio of its revenues, including contributions from States, agencies, and other persons, to costs, excluding capital costs, shall be at least 61 percent.

(B) The Corporation shall conduct an annual review of each route in the basic system to determine if such route is projected to meet the criterion appropriate to such route set forth in subsection (d) of this section, as adjusted to reflect constant 1979 dollars. If the Corporation determines on the basis of such review that such route will not meet such criterion, the Corporation shall discontinue, modify, or adjust the operation of rail passenger service over such route so that the criterion will be met.

(C) The annual review conducted by the Corporation under subparagraph (B) shall include an evaluation of the potential market demand for, and the cost of providing service on routes or portions thereof, and the potential market demand for, and cost of providing service on, alternative routings. The Corporation shall transmit the results of the annual review to each House of the Congress and to the Secretary of Transportation.

(D)(i) No later than 30 days after the beginning of each fiscal year, the Corporation shall evaluate the financial requirements for operating the basic system and its progress in achieving the system-wide performance standards prescribed in this chapter during such fiscal year. If the Corporation determines that the funds to be available for such fiscal year are insufficient to meet the projected operating costs, or if the Corporation projects that the system cannot meet the performance standards of this chapter, the Corporation shall, in accordance with this subparagraph, take such action as may be necessary to reduce such costs and improve performance.

(ii) Any action taken by the Corporation to reduce costs or improve performance pursuant to this subparagraph shall be designed to continue the maximum level of service practicable, and may include—

(I) changes in frequency of service;

(II) increases in fares;

(III) reductions in the costs of sleeper car service on certain routes;

(IV) reductions in the costs of dining car service on certain routes;

(V) increases in the passenger capacity of cars used on certain routes; and

(VI) restructuring or adjustment of the route system or discontinuance of service over routes, considering short-term avoidable loss and the number of passengers served by trains on such routes.

(E) The Corporation shall, prior to October 1, 1983, reduce its costs of management by not less than 10 percent of the administrative costs incurred during the period of twelve calendar months prior to June 1, 1981.

(F)(i) Notice of any discontinuance of service pursuant to this paragraph or section 563(b) of this title shall be posted at least 14 days before such discontinuance in all stations served by the train to be discontinued.

(ii) Notice of any discontinuance of service pursuant to this paragraph or section 563(b) of this title shall be given in such a manner as the Corporation determines will afford an opportunity for any State or group of States, or any regional or local agency or other person, to agree to share the cost of such route, train, or service, or some portion of such route, train, or service. Such notice shall be given at least 90 days prior to such discontinuance.

(iii) Notwithstanding the provisions of clause (ii), the Corporation may discontinue service pursuant to this paragraph or section 563(b) of this title during the first month of a fiscal year if the authorization for appropriations or the appropriations for the benefit of the Corporation for such fiscal year are not enacted at least 90 days prior to the beginning of such fiscal year, and the Corporation may discontinue service

pursuant to this paragraph or section 563(b) of this title during the 30 days following enactment of any appropriation for the benefit of the Corporation or rescission thereof. Notice of discontinuance of service pursuant to the preceding sentence shall be given by the Corporation to any affected State or regional or local transportation authority as soon as possible following the decision to effect such discontinuance.

(5) The Route and Service Criteria shall not apply to—

(A) decisions of the Corporation to increase or, where construction schedules, other temporary disruptive factors, or seasonal fluctuations in ridership so warrant, to decrease frequency of service on existing routes or portions of existing routes or on routes where an additional frequency of service is being tested;

(B) rerouting of service between major population centers on existing routes;

(C) modification or adjustment of service under paragraph (4)(B) of this subsection, and discontinuance, modification, or adjustment under paragraph (4)(D) of this subsection.

(d) Long distance and short distance route operations dependent on short term avoidable loss; factors; calculations; report to Congressional committees

(1) Where reductions in operating expenses can be obtained, the Corporation shall operate rail passenger service over any long distance route which is recommended for discontinuance by the Secretary pursuant to section 4 of the Amtrak Improvement Act of 1978, with or without any restructuring of such route to serve major population centers as end points or principal intermediate points, in order to maintain a national intercity rail passenger system, if the short term avoidable loss per passenger mile on such route, as calculated by the Corporation and projected for the fiscal year ending September 30, 1980, is not more than 7 cents per pas-

senger mile. Short term avoidable loss per passenger mile calculated by the Corporation for purposes of this subsection shall be based upon consistently denied factors for all types of routes, and such short term avoidable loss shall be calculated in the same manner for all routes. The Corporation shall make its calculations under this subsection on the basis of the most recent available statistics for a 90-day period, except that the Corporation may also utilize historical data (such as seasonal fluctuations in ridership) as long as such data is adjusted to reflect the most recent available statistics.

(2) Where reductions in operating expenses can be obtained, the Corporation shall operate rail passenger service over any short-distance route which is recommended for discontinuance by the Secretary pursuant to section 4 of the Amtrak Improvement Act of 1978 with or without any restructuring of such route to serve major population centers as end-points or principal intermediate points, in order to maintain a national intercity rail passenger system, if the short-term avoidable loss per passenger mile on such route, as calculated by the Corporation and projected for the fiscal year ending September 30, 1980, is not more than 9 cents per passenger mile.

(e) Repealed. Pub. L. 97-35, title XI, § 1183(d), Aug. 13, 1981, 95 Stat. 697

(f) Saint Petersburg (Tampa) on the Amtrak Route System

For the purpose of this section and section 4 of the Amtrak Improvement Act of 1978, the reference to Tampa in table 4-1 at page 4-7 of the Secretary's Final Report to Congress on the Amtrak Route System, dated January 1979, shall be deemed to mean Saint Petersburg.

(g) Short-haul train demonstration of major metropolitan area linkage operations

Notwithstanding any other provisions of this chapter (including the requirements of section 563(d) of this title), the Corporation is authorized, to the extent available resources permit, to operate short-haul trains, on a demonstration basis for the purpose of determining the feasibility and benefits of such services, on additional routes of 200 miles or less which link two or more major metropolitan areas.

§ 565. Protective arrangements for employees

(a) Duty of railroads; discontinuance of intercity rail passenger service

A Railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 545 and 562 of this title pursuant to any modification or termination thereof or an assumption of operations by the Corporation. For purposes of subsection (c) of this section and any agreement designed to implement the provisions of such subsection, a "discontinuance of intercity rail passenger service" shall not include any adjustment in frequency or seasonal suspension of intercity rail passenger trains the effect of which is a temporary suspension of service unless such adjustment or suspension causes a reduction of passenger train operations on a particular route to a frequency of less than three round trips per week at any time during any calendar year.

(b) Substantive requirements for protection

Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 11347 of title 49. Any contract entered into pursuant to the provisions of this subchapter shall specify the terms and conditions of such protective arrangements. No contract under section 561(a)(1) of this title between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

(c) Commencement of protection

Upon commencement of operations in the basic system, the substantive requirements of subsections (a) and (b) of this section shall apply to the Corporation and its employees in order to insure the maintenance of the protective arrangements specified in such subsections, except that nothing in this subsection shall be construed to impose upon the Corporation any obligation of a railroad with respect to any right, privilege, or benefit earned by any employee as a result of prior service performed for such railroad. The Secretary of Labor shall certify that affected employees of the Corporation have been provided fair and equitable protection as required

by this section within one hundred and eighty days after assumption of operations by the Corporation.

(d) Obligations of contractors; minimum wages; labor, health, and safety standards

The Corporation shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors and sub-contractors in the performance of construction work financed with the assistance of funds received under any contract or agreement entered into under this title [this subchapter] shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act [40 U.S.C. 276a et. seq.]. The Corporation shall not enter into any such contract or agreement without first obtaining adequate assurance that required labor standards will be maintained on the construction work. Health and safety standards promulgated by the Secretary of Labor pursuant to section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) shall be applicable to all construction work performed under such contracts or agreements, except any construction work performed by a railroad employee. Wage rates provided for in collective bargaining agreements negotiated under and pursuant to the Railway Labor Act [45 U.S.C. 151 et seq.] shall be considered as being in compliance with the Davis-Bacon Act.

(e) Contracts not to result in layoff

(1) Except as provided in paragraph (2) of this subsection, the Corporation shall not contract out any work normally performed by employees in any bargaining unit covered by a contract between the Corporation or any railroad providing intercity rail passenger service on October 30, 1970, and any labor organization, if such contracting out shall result in the layoff of any employee or employees in such bargaining unit.

(2) The provisions of this subsection shall not apply to food and beverage services provided on-board Amtrak trains.

(f) Free or reduced-rate transportation for railroad employees; single systemwide schedule of terms and compensation; reimbursement of Corporation by railroads; retroactive relief after October 1, 1981; "railroad employee" defined.

The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger services provided by the Corporation under this chapter, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all railroad employees eligible to receive free or reduced-rate transportation under such policies or agreements, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. Unless the Corporation and a railroad or group of railroads agree on a different basis for compensation, the Corporation shall be reimbursed by each railroad at the rate of 25 percent of the systemwide average monthly yield per revenue passenger mile. Reimbursement at this rate is in lieu of any charges for liability incident to travel of railroad employees eligible for free or reduced-rate transportation and any other costs incurred by the Corporation in connection with free or reduced-rate transportation and any other costs incurred by the Corporation in connection with free or reduced-rate transportation. Nothing in this subsection shall preclude the Commission from ordering retroactive relief in any proceeding instituted or reopened after October 1, 1981. As used in this subsection, the term "railroad employee"

means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence.

(g) Amtrak commuter exception

The provisions of subsections (a), (b), and (c) of this section shall not apply to Amtrak commuter.

§ 566. Retention and maintenance of facilities

(a) Necessity of approval by Secretary for downgrading or disposal of facilities

No facilities of a railroad (including a regional transportation agency) which are used in the operation of rail passenger services by the Corporation on February 1, 1979, shall be downgraded or disposed of without obtaining the prior approval of the Secretary under this section.

(b) Notification; agreement of Corporation and railroad; applications for approval by Secretary

Whenever any railroad intends to downgrade or dispose of a facility referred to in subsection (a) of this section which is not currently being used in the operation of services by the Corporation, such railroad shall first notify the Corporation of its intention to take such action. If, within 60 days after receipt by the Corporation of such notice, the Corporation and such railroad are not able to enter into an agreement for the retention or maintenance of such facility or for the convenience to the Corporation of such facility or an interest therein, the railroad may apply to the Secretary for approval of the downgrading or disposal of the facility.

(c) Approval of applications; objections to approval; payment of avoidable costs

(1) If the Corporation does not object to an application of a railroad to downgrade or dispose of a facility within 30 days after the date such application is submitted, the Secretary shall promptly approve such application.

(2) If the Corporation makes a timely objection to such an application, the Secretary shall, within 180 days after the date of such objection, determine the costs which the railroad could avoid if it were not required to maintain or retain the facility in the condition requested by the Corporation. If the Corporation does not, within 60 days after the date of the Secretary's determination, agree to pay such avoidable costs to the railroad, the Secretary shall approve such application.

(d) Avoidable costs-agreement considerations; analysis of facilities; survey plans

(1) In electing whether to enter into an agreement pursuant to this section to pay a railroad the avoidable costs of maintaining or retaining a facility, the Corporation shall consider—

(A) the potential importance of restoring rail passenger service on the route on which such facility is located;

(B) the market potential of such route;

(C) the availability, adequacy, and energy efficiency of alternate modes or alternate rail lines for providing passenger transportation to or near the points which would be served by the route;

(D) the extent to which major population centers would be served by such route;

(E) the extent to which the provision of service over such route would encourage the expansion of a national intercity rail passenger system; and

(F) the possibility of increased ridership on lines of railroad connecting with such route.

(2)(A) In order to prepare for a valid and timely analysis of a facility, after a railroad gives notice pursuant to this section that it intends to downgrade or dispose of such facility, the Corporation shall conduct a survey of population centers with railroad passenger service facilities and shall update such survey from time to time as may be necessary or appropriate. Within 90 days after September 29, 1979, the Corporation shall take steps to prepare a survey plan which shall provide for—

(i) a target completion date for the survey of population centers of not later than 360 days after the ninetieth day after September 29, 1979; and

(ii) a system of collection, compilation, and storage of information gathered pursuant to the survey according to geographic region and according to whether a facility would be part of a short- or long-haul route.

(B) The survey should facilitate an analysis of—

(i) ridership potential by ascertaining existing travel patterns or changing travel patterns which would maximize efficiencies of railroad passenger service:

(ii) the quality of service of competitors or likely competitors;

(iii) the likelihood of the Corporation offering service at a competitive fare;

(iv) opportunities to target advertising and fares to potential classes of riders;

(v) economic characteristics of railroad passenger service associated with a facility and the extent to which such characteristics are consistent with sound economic principles of short- or long-haul railroad operations; and

(vi) the feasibility of applying effective internal cost controls to a facility and the route which the facility would serve in order to improve over time the ratio of transportation expenses, excluding maintenance of track, structure, and equipment and depreciation, to passenger revenue.

(e) Definitions; obligations unaffected by downgrading or disposal of facilities

For purposes of this section—

(1) the term "facilities" means railroad tracks, rights-of-way, fixed equipment and facilities, and real property appurtenant thereto, and includes signal systems, passenger station and repair tracks, station buildings, platforms, and adjunct facilities such as water, fuel, steam, electric, and air lines;

(2) the downgrading of a facility means a reduction in track classification as specified in the Federal Railroad Administration track safety standards (49 C.F.R. 213), or any other change in such facilities which may increase the time required for a passenger train to operate over the route on which such facility is located; and

(3) approval of downgrading or disposal under this section shall not be construed as relieving a railroad from compliance with its other common carrier or legal obligations with respect to a facility.

SUBCHAPTER VI—FEDERAL FINANCIAL ASSISTANCE

§ 601. Authorization of appropriations

(a) Capital acquisition and corridor development

(1) Northeast Corridor

There are authorized to be appropriated to the Secretary for the benefit of the Corporation for making capital expenditures under title VII of the Railroad Revitalization and Regulatory Improvement Act of 1976 (45 U.S.C. 851 et seq.)—

(A) $220,000,000 for fiscal year 1993; and

(B) $250,000,000 for fiscal year 1994.

(2) General capital expenditures

There are authorized to be appropriated to the Secretary for the benefit of the Corporation for making capital expenditures under this chapter—

(A) $250,000,000 for fiscal year 1993; and

(B) $250,000,000 for fiscal year 1994.

(3) New corridor development

(A) In general

Of the amounts appropriated pursuant to paragraphs (1) and (2), not more than 15 percent of each amount shall be made available for projects described in subparagraphs (B) and (C) of this paragraph.

(B) Corridors between densely populated cities

(i) Except as provided in clause (ii), funds made available under subparagraph (A) shall be used

to develop new intercity rail passenger service on corridors—

(I) between cities undergoing significant population growth; and

(II) where such service can reasonably be expected to provide travel times comparable with other surface transportation modes.

(ii) Amounts shall be expended for the purposes described in clause (i) only if the service is requested by a State or States and the Corporation and such State or States agree that—

(I) at least 90 percent of the cost of the acquisition of rolling stock for such service shall be paid by the Corporation; and

(II) at least 90 percent of the cost of improvements in the right-of-way, including track structure, signal systems, passenger station facilities, highway and pedestrian grade crossings, and other safety equipment or facilities, shall be paid by the State or States.

(iii) Service described in clause (i) shall be subject to section 563(b) of this title with respect to operating expenses.

(C) Long distance rail passenger corridor development

(i) Except as provided in clause (ii), funds made available under subparagraph (A) shall be used to initiate new long distance intercity rail passenger service.

(ii) Amounts shall be expended for the purposes described in clause (i) only if the service is requested by a State or States and the Corporation and such State or States agree that—

(I) at least 75 percent of the cost of the acquisition of rolling stock for such service shall be paid by the Corporation; and

(II) at least 90 percent of the cost of improvements in the right-of-way, including track structure, signal systems, passenger station facilities, highway and pedestrian grade crossings, and other safety equipment or facilities, shall be paid by the State or States.

(iii) Service described in clause (i) shall be subject to section 563(b) of this title with respect to operating expenses.

(b) Operating expenses

(1) Core system

There are authorized to be appropriated to the Secretary for the benefit of the Corporation for operating expenses—

(A) $381,000,000 for fiscal year 1993; and

(B) $381,000,000 for fiscal year 1994.

Of the amounts appropriated in subparagraphs (A) and (B), not more than 5 percent for each fiscal year shall be used for the payment of operating expenses under section 563(b) of this title for service in operation as of September 30, 1992.

(2) New State-supported service

There are authorized to be appropriated to the Secretary for the benefit of the Corporation for operating losses under section 563(b) of this title for service commencing after September 30, 1992—

(A) $7,500,000 for fiscal year 1993; and

(B) $9,500,000 for fiscal year 1994.

The expenditure by the Corporation of funds appropriated for operating losses under section 563(b) of this title for service commencing after September 30, 1992, shall not be considered to be an operating expense for purposes of calculating the revenue-to-operating expense ratio of the Corporation.

(c) Mandatory payments

There are authorized to be appropriated to the Secretary $150,000,000 for fiscal year 1993, and such sums as may be necessary for fiscal year 1994, for the payment of—

(1) tax liabilities under section 3221 of title 26 due in such fiscal years in excess of amounts needed to fund benefits for individuals who retire from the Corporation and for their beneficiaries;

(2) obligations of the Corporation under section 358(a) of this title due in such fiscal years in excess of its obligations calculated on an experience-rated basis; and

(3) obligations of the Corporation due under section 3321 of title 26.

Funds appropriated under this subsection shall not be considered a Federal subsidy of the Corporation.

(d) Administration of appropriations

Funds appropriated pursuant to this section shall be made available to the Secretary during the fiscal year for which appropriated, except that appropriations for capital acquisitions and improvements may be made in an appropriations Act for a fiscal year preceding the fiscal year in which the appropriation is to be available for obligation. Funds appropriated are authorized to remain available until expended. Appropriated sums shall be paid by the Secretary to the Corporation for expenditure by it in accordance with the Secretary's budget request as approved or modified by Congress at the time of appropriation. Payments by the Sec-

retary to the Corporation of appropriated funds shall be made no more frequently than every 90 days, unless the Corporation, for good cause, requests more frequent payment before the expiration of any 90-day period.

(e) Schedule of payments

In each fiscal year in which funds are authorized to be appropriated under this section, payments by the Secretary to the Corporation of appropriated funds shall be made on the following basis—

(1) 50 percent on the first day of a fiscal year;

(2) 25 percent on the first day of the second quarter of a fiscal year; and

(3) 25 percent on the first day of the third quarter of a fiscal year.

SUBCHAPTER VIII—MISCELLANEOUS PROVISIONS

§ 644. Records and audit of the Corporation and certain railroads

(1)(A) The accounts of the Corporation shall be audited annually in accordance with generally accepted auditing standards by independent certified public accountants or independent licensed public accountants certified or licensed by a regulatory authority of a State or other political subdivision of the United States. The audit shall be conducted at the place or places where the accounts of the Corporation are normally kept. All books, accounts, financial records, reports, files, and other papers, things, or property belonging to or in use by the Corporation and necessary to facilitate the audit shall be made available to the person conducting the audit; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians shall be afforded to such person.

(B) The report of each such independent audit shall be included in the annual report required by section 548(a) of this title. The audit report shall set forth the scope of the audit and include such statements as are necessary to present fairly the Corporation's assets and liabilities, surplus or deficit, with an analysis of the changes therein during the year, supplemented in reasonable detail by a statement the Corporation's income and expenses during the year, and a statement of the sources and application of funds, together with the independent auditor's opinion of those statements.

(2)(A) The Comptroller General of the United States may conduct performance audits of the activities and transactions of the Corporation in accordance with generally accepted management principles, and under such rules and regulations as may be prescribed by the Comptroller General. Any such audits shall conducted at such place or places as the Comptroller General may deem appropriate. The representa-

tive of the Comptroller General shall have access to all books, accounts, records, reports, files, and other papers, things, or property belonging to or in use by the Corporation pertaining to its financial and other transactions and necessary to facilitate the audits, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, records, reports, files, papers, and property of the Corporation shall remain in possession and custody of the Corporation.

(B) To the extent the Comptroller General deems necessary in connection with audits as he may make of the financial transactions of the Corporation pursuant to paragraph (A) of this subsection, his representatives shall have access to all books, accounts, records, reports, files, and other papers, things, or property belonging to or in use by any railroad with which the Corporation has entered into a contract for the performance of intercity rail passenger service, pertaining to such railroad's financial transactions and necessary to facilitate the audits, and such representatives shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, records, reports, files, papers, and property of such railroad shall remain in the possession and custody of the railroad.

(C) A report of each such audit shall be made by the Comptroller General to the Congress. The report to the Congress shall contain such comments and information as the Comptroller General may deem necessary to inform Congress of the financial operations and condition of the Corporation, together with such recommendations with respect thereto as he may deem advisable. The report shall also show specifically any program, expenditure, or other financial transaction or undertaking observed in the course of the audit, which, in the opinion of the Comptroller General, has been carried on or made without authority of law. A copy of each report shall

be furnished to the President, to the Secretary, and to the Corporation at the time submitted to the Congress.

§ 650a. National Railroad Passenger Corporation; petitions for relocation or other remedial assistance for dangerous conditions; recommendation by Secretary to Congress

(1) The National Railroad Passenger Corporation (hereafter in this section referred to as "Amtrak"), or the owner of any facility which presents a danger to the employees, passengers, or property of Amtrak, may petition the Secretary for assistance to the owner of such facility for relocation or other remedial measures to minimize or eliminate such danger under this section.

(2) If the Secretary determines that—

(A) a facility which is the subject of a petition under paragraph (1) presents a danger of death or serious injury to any employee or passenger of Amtrak or serious damage to any property of Amtrak; and

(B) the owner of such facility should not be expected to bear the cost of relocating or other remedial measures necessary to minimize or eliminate such danger the Secretary shall recommend to the Congress that the Congress authorize funding, by reimbursement or otherwise, for such relocation or other remedial measures.

(3) Petitions may be submitted under paragraph (1) with respect to any relocation or remedial measures undertaken on or after January 1, 1978.

SUBCHAPTER I—GENERAL PROVISIONS

§ 701. Congressional declaration of policy

(a) Findings

The Congress finds and declares that—

(1) Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act.

(2) This essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans for reorganization. This rail service is operated over rail properties which were acquired for a public use, but which have been permitted to deteriorate and now require extensive rehabilitation and modernization.

(3) The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers.

(4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system.

(5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conversation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.

(6) These needs cannot be met without substantial action by the Federal Government.

(b) Purposes

It is therefore declared to be the purpose of Congress in this chapter to provide for—

(1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;

(2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

(3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;

(4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;

(5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and

(6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.